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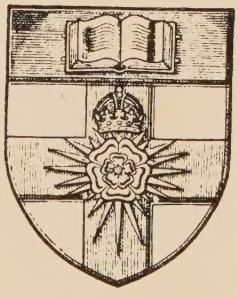

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LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

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COURT OF APPEAL.

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1922.—VOL. II.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

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Page	*Line*	*For*	*Read*
		[1922] 1 Ch.	
211	"Attorney-General *v.* Corporation of Liverpool." *Headnote*, line 10, the second comma should follow the word "terms." *Headnote*, line 17, after word "power" insert words "to carry on such business and"		
231	Line 4. Correction as in line 10 of headnote		
		[1922] 2 Ch.	
37	Footnote (4)	[1903] 1 K. B. 597	[1903] 1 K. B. 577
508	The names of the solicitors should be transposed and read as follows: Solicitors for appellants: *Hamlins, Gammer & Hamlin, for R. Clayton, Radcliffe.* Solicitors for respondent: *Shaen, Roscoe, Massey & Co.*		

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1922, will be as follows:—

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

KENNARD *v.* CORY BROTHERS AND COMPANY, LIMITED.

C. A.
1922
March 20, 21.

[1916. K. 625.]

Injunction—Nuisance—Negligence—Landslide—Remedial Works—Damages—Liberty to apply in Case of apprehended Danger—Maintenance of Remedial Works—Mandatory Injunction.

Under a licence of the plaintiffs the defendants, a colliery company, tipped refuse on the side of a mountain on land belonging to the plaintiffs. The defendants so tipped as to give rise to a landslide causing injury to the plaintiffs' buildings. In the course of the action brought by the plaintiffs an order was made by consent for the execution of remedial works, consisting mainly of drainage works to prevent any further slide, the works to be paid for ultimately by the unsuccessful parties. The plaintiffs succeeded in the action and obtained a declaration that the landslide was caused by the acts of the colliery company, and that the company were liable to the plaintiffs for all damages sustained or thereafter to be sustained by them by reason of the movement or any recurrence or continuation thereof; a perpetual injunction to restrain the defendant company from any further tipping to the prejudice of the plaintiffs; and an inquiry as to any damages sustained by the plaintiffs by reason of the defendant company's acts. Liberty was also granted to the plaintiffs to apply in case of apprehended damage for a mandatory

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injunction to compel the defendant company to do and execute such works as might be necessary (inter alia) to keep open the remedial works. Part of the remedial works being out of order, the plaintiffs moved in the action for a mandatory injunction to compel the defendants to restore the works to order.

Sargant J. held that the estimated costs of maintaining the remedial works was not recoverable against the defendants under the inquiry as to damages, and granted a mandatory injunction requiring the defendants to execute such works as might be necessary to restore the remedial works by clearing out the manhole at the top of the drain marked "B" to "B" shown on a plan exhibited to an affidavit filed on behalf of the plaintiffs and putting that drain into working order. On appeal:—

Held, that, although it was not the practice of the Court to grant a mandatory order for the execution of a series of successive operations, it could and ought to grant a mandatory order compelling the execution of the specific work required to remedy the existing defect in the remedial works, and that there was therefore no objection in the particular circumstances to the order made by Sargant J. The fact that the drain was situate on the plaintiffs' land was not an objection to the order, because in the circumstances of the case it must be assumed that the plaintiffs were willing to allow the defendants to enter upon their land for the purpose of doing the work.

Decision of Sargant J. [1922] 1 Ch. 265 affirmed.

APPEAL by the defendants from a decision of Sargant J. (1)

The facts are fully stated in the report of the case in the Court below and sufficiently appear from the judgment of the Master of the Rolls.

Tomlin K.C. and *Topham K.C.* for the appellants. Sargant J. in making the mandatory order in the circumstances of this case has departed from the usual practice of the Court. The lease under which these tippings were made expired on December 31, 1916. Thereupon the defendants ceased to have any rights in the land on which the tip was placed. The new lease, which is dated February 25, 1920, took effect as from January 1, 1917, and is in somewhat different terms. Under it the defendants are not entitled to tip without the consent of the plaintiffs, and that consent has not as yet been obtained. The site of the tip is not demised to the defendants, but they have a right over it for colliery purposes. In no sense therefore can it be said that defendants are now in occupation under the lease of the

(1) [1922] 1 Ch. 265.

land on which the tip is placed. The action is one for damages for negligence in which the defendants have been held to be liable once and for all. In estimating those damages one of the matters to be taken into consideration is the fact that remedial works have been constructed which may impose a burden for their maintenance. If the Court gives a litigant liberty to apply for a thing it does not give him a right to it if he would not otherwise be entitled to it. It is not a question of jurisdiction. The Courts of Chancery acting in personam can order a person to do anything and if he does not do it can send him to prison. It is a question of the principle on which the Court will act in personam. The Court will not order A. to do something on B.'s land. The remedy is for B. to do it and then to charge A. with the expense of doing it. The Court will not put its elaborate machinery in motion to compel the defendants to do on the plaintiffs' land what the plaintiffs can do themselves. In *Earl of Harrington* v. *Derby Corporation* (1) one of the questions was whether a mandatory order should be granted compelling the defendants to clean out a lake and watercourse on the plaintiffs' property which had been polluted by sewage from the defendants' sewers, and it was held by Buckley J. that such an order was impossible and that the proper remedy (if any) in respect of the matter was in damages.

[LORD STERNDALE M.R. You do not go so far as to say that the Court cannot order a thing to be done on another man's land.]

In *Attorney-General* v. *Staffordshire County Council* (2) an attempt was made to fix the county council with liability to do particular works or repairs necessary to the maintenance of their road, and Joyce J. there said: "Now a mandatory order, as I understand the practice of the Court, will not be made to direct a person to repair. As we all know, the Court will not superintend works of building or of repair." See also *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (3)

(1) [1905] 1 Ch. 205, 221. (2) [1905] 1 Ch. 336, 342.
(3) (1874) L. R. 9 Ch. 331.

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There is a great distinction between an order to "erect" and an order to "maintain" works. The question is one of principle and practice and not of jurisdiction. It is submitted that the liberty to apply in the order cannot be utilised as a concluded judgment against the appellants.

The Court will not impose on the appellants a liability of this character. *Goodson* v. *Richardson* (1) is the only case in which such an order has been made.

If the Court can say that one definite thing is to be done then a mandatory injunction is the right remedy, but where, as here, it is a series of acts the right remedy is in damages.

In *Bidwell* v. *Holden* (2) a repairing order was made; but there the circumstances were very special. The order was made in default of appearance and without argument.

The only case in which the whole of the damage is not covered by an order for damages is where there is subsequent damage which is the subject of a fresh cause of action, as in subsidence cases. Could the plaintiffs in this case come to the Court ten years hence and say that the remedial works are out of order and that the defendants must repair them? It is submitted they could not. The Court will not say to the defendants: "Execute these remedial works and keep them in repair for an indefinite period." The cause of action here has been once and for all satisfied by the judgment.

Romer K.C. and *MacSwinney* for the respondents. In this case it is necessary to see what is the precise position of the parties. On the land on which the defendants were entitled to tip their colliery refuse they have been found to be negligent in tipping. By reason of that negligence part of the tip escaped and came down upon land of the plaintiffs on which the defendants had no right of entry. In those circumstances an application was made to the Court to prevent the other part of the tip from coming down on to the land of the plaintiffs. The statement of claim asked for damages in respect of that part of the tip which had come down. The object of the remedial works was to prevent the rest of the tip from coming down.

(1) (1874) L. R. 9 Ch. 221. (2) (1890) 63 L. T. 104.

The order for damages does not cover subsequent damages. The plaintiffs must wait until the damage has happened: *West Leigh Colliery Co.* v. *Tunnicliffe & Hampson, Ld.* (1) The best way to have remedied the nuisance would have been to have required the defendants to remove the whole of the tip. The reason why in certain cases the Court refuses to grant a mandatory injunction is that the thing to be done is too indefinite and the Court cannot supervise it: *Lumley* v. *Wagner.* (2)

If, as in this case, the only obligation is to keep a particular drain free from obstruction there is no difficulty in granting a mandatory injunction: *Attorney-General* v. *Staffordshire County Council.* (3) In that case Joyce J. said: "It is the necessary requisite of every injunction and every mandatory order that it should be certain and definite in its terms, and it must or ought to be quite clear what the person against whom the injunction or order is made is required to do or to refrain from doing." The present order fulfils those requirements. In *Puddephatt* v. *Leith* (4) Sargant J. granted a mandatory injunction requiring a mortgagee who held certain shares as part of his security to vote in respect of them as directed by his mortgagor. The question of perpetuity does not here arise. There is no more difficulty in granting a mandatory injunction than a negative injunction extending over a number of years.

[SCRUTTON L.J. Does the liberty to apply do more than keep the action alive?]

No. As the order stands the plaintiffs cannot get more than damages in respect of the particular part of the tip which has come down. In Seton on Judgments and Orders, 7th ed., vol. i., p. 520, a list is given of instances in which mandatory injunctions have been granted.

There is no difficulty in granting a mandatory injunction requiring a person to do something that is definite. The only difficulty arises where the thing to be done is indefinite.

In the older cases the Court has never refused specific

(1) [1908] A. C. 27.
(2) (1852) 1 D. M. & G. 604.
(3) [1905] 1 Ch. 336, 342.
(4) [1916] 1 Ch. 200.

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performance of an agreement to build where what was to be done was sufficiently defined: *Lane* v. *Newdigate*. (1) Even in the case of a covenant to repair, if the covenant is sufficiently definite the Court will enforce it. The Court has never decreed specific performance of part of a covenant where it could not enforce the whole. But that is no reason why it should not from time to time grant an injunction to protect the plaintiff. In *Ryan* v. *Mutual Tontine Westminster Chambers Association* (2) the Court refused to grant specific performance of a contract on the ground that as the contract was not severable and as it could not grant specific performance of the whole, it would not decree specific performance of part. In *Lane* v. *Newdigate* (3) Lord Eldon granted a negative injunction, which would have the effect of making the defendant execute repairs.

[WARRINGTON L.J. referred to the form of the order in the present case giving liberty to apply.]

The liberty to apply was inserted in the order to avoid the necessity of making an order, which might have been unnecessarily harsh on the defendants, requiring them to remove the spoil which had not come down. The object of the remedial works was as much to prevent the remainder of the spoil from coming down as to prevent that which had already come down from coming farther.

Tomlin K.C. in reply. The respondents have not produced a single reported case like the present in which a mandatory injunction has been granted. The jurisdiction to grant a mandatory injunction must be very carefully exercised. This case has no parallel. The onus is therefore on the respondents to show that there should be an extension of the jurisdiction. The remedial works were to prevent any recurrence of the nuisance and were in fact an abatement of the nuisance. They stand in the position of remedial works executed in pursuance of the order. There is no question now that they are permanent works of abatement. The question now is whether it is in accordance with principle that an order should be granted for their permanent maintenance.

(1) (1804) 10 Ves. 192. (2) [1893] 1 Ch. 116. (3) 10 Ves. 193.

[SCRUTTON L.J. referred to *Hood* v. *North Eastern Ry. Co.* (1)]

That was a case of contract; the obligation was there. Specific performance is not granted with respect to every contractual obligation where the breach of it is adequately met by damages: Fry on Specific Performance, 6th ed., § 98, p. 45; *Lucas* v. *Commerford.* (2)

[SCRUTTON L.J. *Greene* v. *West Cheshire Ry. Co.* (3), which was followed in *Fortescue* v. *Lostwithiel and Fowey Ry. Co.* (4), shows that orders to maintain will be made.]

All the text-books have rather treated the case of railway companies as sui generis. Orders in those cases have gone further than in other cases.

It is submitted that there is no limitation on the jurisdiction of the Court to make these orders, but in practice the jurisdiction is exercised within certain defined limits, and the Court will not go outside those limits except in a case where the circumstances are very special. Here the defendants have had damages for the injury done to them including damages for the depreciation of their land caused by its being burdened with the liability to repair these remedial works and they also have the remedial works themselves. It has been said over and over again that the Court will not grant a mandatory order to repair and will not order a defendant to do work on another person's land. The Court will not order something to be done which involves supervision and will not do indirectly what it will not do directly. This is an attempt to induce the Court to do indirectly what it will not do directly.

Here the remedy in damages is adequate and convenient and the plaintiffs are the natural persons to do the work on their own land. The order which has been made is without parallel and ought never to have been made.

LORD STERNDALE M.R. This is an appeal, which is another phase of what is commonly known as the "Moving Mountain" case. It raises a very difficult question.

(1) (1870) L. R. 5 Ch. 525.
(2) (1790) 3 Bro. C. C. 166.
(3) (1871) L. R. 13 Eq. 44.
(4) [1894] 3 Ch. 621.

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I will state the history of the case as shortly as possible, because it is necessary to do so in order to see how the question arises. The action was brought by the owners of certain land on the lower part of a slope against the defendants who were the lessees of the upper part of the slope and had put upon that part a certain tip for spoil from their colliery. The upper part of the tip and some of the land on which the tip was placed came down upon the lower part of the slope and caused damage to the plaintiffs, and an action was brought by them claiming a declaration that the defendants were liable, and if necessary an injunction to compel them to remove the remaining part of the tip which had not come down and the part which had come down from where it was in order to prevent it coming down any further and certain other relief. Before the action came on for trial certain works were done which were mainly, if not entirely, drainage works, for the purpose of preventing any further movement or any further damage, and they were done at the joint expense of the parties on the terms that the defendants should only pay for the whole of them if they were found to be responsible for the movement of the tip and of the ground upon which the tip was placed. They were so found responsible on the ground that what they had done was negligent, because they had placed a tip upon badly drained land with the result that both the land and the tip came down, and the following judgment was given: "This Court doth order that the said counterclaim"—by which the defendants claimed damages on the ground that the slip was due to certain works executed by the plaintiffs and their predecessors—"do stand dismissed out of this Court. And this Court doth declare that the movement of part of the side of the Pentre Mountain in the pleadings mentioned and of the debris thereon was caused by the acts of the defendant company in placing tips and in tipping colliery refuse on the side of the said mountain, and that the said company are liable to the plaintiffs for all damage sustained by them by reason of the said movement or by reason of any recurrence or any continuation of such movement. And it is ordered that the

defendant company be perpetually restrained from further tipping or depositing refuse on the said mountain side so as to endanger or threaten injury or obstruction to the highway, tramways, mains, sewers and other works of the plaintiffs." Nothing turns upon that. Then the judgment continues: "And it is ordered that the following enquiry be made that is to say: (1.) An enquiry what damages have been sustained by the plaintiffs by reason of the said acts of the defendant company such damages to include the costs of negotiations and all moneys paid or to be paid by the plaintiffs under the terms No. 6 and 7 scheduled to the order dated the 16th day of November, 1916." I have not got that order, but I understand it is the order under which the drainage works were done. Then there is an order as to costs and then there follows this: "And the plaintiffs are to be at liberty to apply in case of apprehended danger for a mandatory injunction to compel the defendant company to do and execute such works as may be necessary"—and then there are three things mentioned: (1.) "permanently to protect the plaintiffs' highways, tramways, mains, sewers and other works"; (2.) "or otherwise to abate the nuisance caused by the acts of the defendant company" and (3.) "or to keep the present works open." It is not clear whether that affects the inquiry as to damages or not, except in this way, that if works which would otherwise be the subject of a claim for damages are done by the defendants under a mandatory injunction for which there is liberty to apply, in that case they could not get the work done and the damages as well; and Sargant J. who tried the case seems to have been of the opinion that that liberty to apply was intended to take such work as might come under the liberty to apply out of the inquiry as to damages. In his judgment on December 21 last he says (1): "But on the other hand the terms of the liberty to apply cannot be disregarded in construing the meaning of the other parts of the judgment, including that part which directs an inquiry as to damages, and are at least an indication that the damages to be assessed are not to include damages caused

(1) [1922] 1 Ch. 265, 273.

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by such a subsequent movement as is designed to be prevented by an application under the liberty." The original judgment came before this Court and was reversed by a majority of the Court. It then went to the House of Lords (1) and the House of Lords restored the judgment of Sargant J. reversing the decision of this Court, and therefore the order that I have read now stands. There does not seem to be any reason for thinking that this liberty to apply was under the consideration either of this Court or of the House of Lords. The rest of the judgment seems to have been criticised pretty severely in both Courts, but this part does not seem to have had any attention paid to it, not because the defendants intended to assent to it, but because there were other more important matters engaging the attention of the Court. That is the history so far as it is necessary to state it.

This case arises in these circumstances. A certain part of these drainage works became choked and as a consequence the remedial action was prevented and under the liberty to apply Sargant J. was asked by the plaintiffs to grant a mandatory injunction against the defendants to remove the obstruction and remedy the choking of the works. After hearing the argument he made this order: "This Court doth order that the defendants do execute such works as may be necessary to restore the remedial works by clearing out the manhole at the top of the drain marked 'B' to 'B' shewn in the plan A prepared by William Stanley Smith and being the exhibit marked 'A' to the said affidavit of the said William Stanley Smith and putting this drain into working order." It was therefore an order to do certain specific work of an insignificant character. As a matter of fact the defendants had already done it, but they still say that the order ought not to have been made having regard to the altered position now occupied by them under their present leases with reference to the land formerly held by them. I ought to say that these drainage works are not upon any land over which the defendants have any control:

(1) [1921] 1 A. C. 521.

they are on the plaintiffs' land. That no doubt is a matter to be considered. It must be taken, I think, that the plaintiffs are willing to allow them access to the land for the purpose of doing the work. If they are not then the defendants will have good ground for saying that they cannot perform this order. But still the fact that the work has to be done upon land which is not the defendants' land is a matter to be taken into consideration in determining whether a mandatory order ought or ought not to be granted. Now I do not think that the question of the altered position of the defendants under their leases has anything to do with this matter, and it was not really pressed before us, although it was dealt with by the learned judge. But there are two other reasons which are important and raise, as I said before, I think, difficult questions. The first is that this is an order involving a mandatory injunction to repair generally, and that according to the practice of this Court such an order will not be granted. The second which I will take is this, that the work which has to be done ought to be done by the plaintiffs themselves, as the natural persons to do it on their own land, and that if they do it they will be compensated by the damages which they are to receive either by the actual specific sum of the cost of the work, or, more correctly, I think the defendants will say, by an assessment of damages based on the diminished value of the plaintiffs' land in consequence of it being burdened with an obligation involving an expenditure of money to keep these remedial works in repair. The case has been compared with that of an owner of land whose land would be diminished in value by having upon it a seawall which he would be bound to repair, so here it was said, that as in order to keep these remedial works effective it would be necessary for the plaintiffs to have them cleaned out and attended to from time to time, the land was diminished in value by the fact that there was that obligation laid upon them; and I think I may add a third reason which sums up all the others—namely, that taking all the circumstances of the case into consideration convenience requires that the matter should

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be dealt with as a question of damages and not by a mandatory injunction. To take the first point, I am inclined to think, that although we are only dealing with one order, requiring one specific piece of work to be done, the practical effect of the order will be to require the defendants to keep these works free from obstructions—and therefore in that sense to repair them. I cannot see any objection in principle to that obligation being laid upon the defendants. Indeed when it is said that they would have to pay damages for the diminished value of the land by reason of the plaintiffs being obliged to keep these works free from obstruction and in repair it seems to me that it is admitted that there is such an obligation upon them, but that the objection really is to the method of enforcing the obligation. It is, I think, pretty clear that as a general rule the Court will not grant a mandatory injunction in general terms to repair or to maintain, and that in considering whether it will do so or not one of the circumstances which may influence it in coming to a conclusion not to grant such an injunction is that the work will have to be done upon land which is not the land of the defendant. The ground on which the Court refuses to grant such an injunction has been stated over and over again, and I take it as stated by Kay L.J. in *Ryan* v. *Mutual Tontine Westminster Chambers Association* (1) to which we were referred. He there says: "Ordinarily the Court will not enforce specific performance of works, such as building works, the prosecution of which the Court cannot superintend; not only on the ground that damages are generally in such cases an adequate remedy, but also on the ground of the inability of the Court to see that the work is carried out." The word "superintend" or "superintendence" has been used in a number of other cases, and the only ground that I can see there stated for not granting such a mandatory injunction is the difficulty, as it is called, of superintendence —of course the Court does not in fact ever superintend— but the difficulty of enforcing the order without the superintendence of the Court from time to time to see that the

(1) [1893] 1 Ch. 116, 128.

continuous work is carried on and the impossibility of the Court exercising such superintendence. But I do not find that there is any objection in principle to the imposition of such an obligation upon a wrongdoer. The question arises sometimes in tort sometimes in contract, and indeed, as I have already said, the fact that in the present case that obligation is in one sense imposed upon the defendants is shown by the fact that one of the contentions is that the payment of damages to the plaintiffs, because the plaintiffs are obliged to do that work, is a sufficient remedy. The admission that damages may be recovered for it is an admission of the obligation that is cast upon the defendants, the wrongdoers, and that difficulty of superintendence or of ordering certain unspecified and undefined works to be done does not here exist. The order is, as I have read it, to clear out a certain particular length marked out upon a plan of a drain which is already there, so that no question of superintendence or of undefined or unspecified works arises. When we come to consider whether it is sufficient that the plaintiffs should be compensated in damages in the way that is contended for it is, I think, important to see that it is by no means clear upon the order of the Court as it stands that these damages are included in the inquiry as to damages which was thereby directed. According to the opinion of the learned judge who made the order they are not. I do not express a confident opinion that they are not, but it is at any rate not clear upon the order that they are, and as the liberty to apply for this kind of relief was reserved in the same order which granted the inquiry as to damages I do not think in this case and in these particular circumstances that there is any objection to the order which the learned judge has made. I know that this is deciding the matter on rather a narrow ground, but I think it is necessary to decide it upon the actual circumstances of this case, because I find that in many of the cases to which we have been referred the whole matter has turned upon the exact position of the parties and the exact circumstances of the particular case, and looking at it in that way I do not think that there is

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any ground for interfering with the order of the learned judge. I think therefore that the appeal should be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The appellants are the defendants in the action and the respondents are the plaintiffs. The action was brought by the plaintiffs for relief in respect of damage occasioned to them by the alleged negligent and improper exercise by the defendants of certain rights of tipping colliery spoil which they possessed, which was said to have resulted in damage to the plaintiffs' land and caused an apprehension of further damage. The first paragraph of the plaintiffs' claim was expressed in these terms: "A mandatory order upon the defendants to remove the debris tipped by them upon the Church Farm so far as may be necessary to prevent the same from causing further damage thereto and to the buildings and other erections thereon and to take all such remedial measures as are necessary for preventing further damage from such tips." In the course of the action and on an application for an interlocutory injunction a consent order was made under which certain works were constructed by contractors mentioned in the order with the object of preventing further damage as the result of the acts of the defendants and provision was made for casting upon the unsuccessful party in the action the cost of carrying out those works. Those works were effected, and so far it is believed on both sides that they are an effectual protection against the recurrence of the trouble which caused the damage in respect of which the action was brought. That being so, judgment in the action was pronounced on July 31, 1918. I think it is necessary, in order to explain the position which the matter takes in my mind, to read the greater part of that judgment. It begins with a declaration: "That the movement of part of the Pentre mountain in the pleadings mentioned and of the debris thereon was caused by the acts of the defendants in placing tips and in tipping colliery refuse on the side of the said mountain, and that the said company are liable to the plaintiffs for all damage sustained by them or

which may hereafter be sustained by them by reason of the said movement or "—and this is important—" by reason of any recurrence or continuation of such movement." Then there is an injunction restraining the defendant company "from further tipping or depositing refuse on the said mountain side so as to endanger or threaten injury to the buildings and other erections thereon of the plaintiffs." Then follows the inquiry as to damages: "An inquiry what damages have been sustained "—that is to say, have already been sustained—" by the plaintiffs by reason of the said acts of the defendant company, such damages to include the costs of negotiations and all moneys paid or to be paid by the plaintiffs under the terms numbered 6 and 7 scheduled to the order dated the 16th day of November, 1916," that is the order under which the remedial works were constructed. The moneys referred to in the inquiry were the moneys expended in effecting those remedial works. Then after a direction as to costs there comes the important part of the judgment upon which the present question to some extent turns: "And the plaintiffs are to be at liberty to apply in case of apprehended danger for a mandatory injunction to compel the defendant company to do and execute such works as may be necessary to permanently protect the plaintiffs' said buildings and other erections thereon or otherwise to abate the nuisance caused by the acts of the defendant company or to keep the present works open." I will say what I have to say about the effect of that directly. That judgment went to the Court of Appeal and was reversed by a majority of the Court. There was an appeal not by the present plaintiffs, but by the plaintiffs in another action in which the present plaintiffs were respondents, to the House of Lords (1) and there Sargant J.'s judgment was restored, and it was restored, of course, in every part, including the liberty to apply. Now in my opinion upon the true construction of that order the liberty to apply reserved in it implies an obligation on the part of the defendants to maintain the

(1) [1921] 1 A. C. 521.

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works that had been constructed in such a way as to be an effectual protection against the further danger which was apprehended by the plaintiffs. As I read the order it means this. The order had two things to provide for: it had to provide for damage that had already been incurred (and it did that by the inquiry as to damages) and it had to protect, as far as might be, the plaintiffs against a recurrence of further damage and injury. The works that had been constructed were, at the moment when the judgment was pronounced, accepted by both parties as effectual for the purpose, and accordingly there was no necessity at that moment for a mandatory injunction to construct or maintain further works. But instead of that mandatory injunction the liberty to apply was inserted, and the liberty to apply was in such wide terms that it enabled the Court, if necessary, short of ordering absolutely new works, to order such further works to be done, possibly by means of repair, possibly by means of renewal, possibly by means of removing obstructions to those works, as would render them effectual to protect the plaintiffs in view of apprehended danger, or to be and to amount to an abatement of a nuisance. It seems to me that the judgment did then impose upon the defendants an obligation, not by an injunction, because an actual injunction to do repairs or to do certain works not specified would of course be too indefinite to enforce; but it recognized the obligation and gave the plaintiffs the right to apply for such mandatory injunction as would be necessary to give effect to that obligation and as would be, when applied for, consistent with the practice of the Court in granting mandatory injunctions. Assuming as I do for the present purpose that that is the correct meaning of the judgment, I now turn to consider the order which has been actually made and the circumstances under which it was made. The plaintiffs complain that the remedial works, which consisted mainly of drainage works, had been obstructed in certain parts by, I think, a slight fall of rock, but at any rate they had been obstructed, and they applied to the Court by notice of motion for an order under the liberty to apply. I do not read

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the notice of motion, because it is now admitted that the plaintiffs asked for a good deal which was unnecessary at the moment and which under the circumstances they would certainly not have obtained. But what they did ask for at the Bar was a remedy which the judge ultimately granted them. What the judge ultimately granted was this: "That the defendants do execute such works as may be necessary to restore the remedial works by clearing out the manhole at the top of the drains marked 'B' to 'B' shown in the plan A prepared by William Stanley Smith and being the exhibit marked 'A' to the said affidavit of the said William Stanley Smith and putting this drain into working order." In that order itself there is nothing that offends against the well-known principles under which the Courts grant mandatory injunctions for doing certain works. The works are defined; there is no question about them; they have in fact been already done. It is true that they are to be effected not on the defendants' land but upon the plaintiffs' land, but the very fact that the plaintiffs ask that the works may be done implies their consent to the entry of the defendants on their land to do the works. Of course if the defendants had any difficulty in entering and they were lawfully prevented by a tenant of the plaintiffs or in some other way from entering that might possibly be, in fact I think it would be, a defence to an application made to commit them for not doing the works; so that I really think no question arises upon that point, and, as I have said, no question arises with regard to the definiteness of the works. So far I see no objection to the order which the learned judge has made. But it is said that the order implies an obligation on the part of the defendants to keep these works in repair, and that that is an obligation which the Court will not impose by injunction. Now in the first place I am far from satisfied that this order would be a precedent for any other order that might be asked for. The circumstances may be different. If on some subsequent occasion the plaintiffs make an application under this liberty to apply for some other order it will be the duty of the judge before whom the matter comes to consider

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the circumstances of that application and to see whether that order is a proper one to be made. Then it is said that the result of this order, if made, will be that the defendants will be treated as under a perpetual obligation to keep these works in repair. My answer to that is that they are already under that obligation, not as the result of this order or any other order which may be made under the liberty to apply, but upon the true construction of the judgment itself. There is a difference, which I think has been ignored, if I may say so with respect, by Mr. Tomlin, between imposing or recognizing by judgment an obligation to repair and enforcing it by a mandatory injunction, and the Court will have to consider, whenever the plaintiffs come for a mandatory injunction, the terms in which that injunction is asked for and whether it is one which can properly be granted. The point made by Mr. Tomlin which impressed me most was that the default in keeping these works in working order was one which could be compensated for in damages. The particular default is one, no doubt, which could be compensated for in damages and completely compensated for, because it was a matter of a man or two going with some barrows and taking away a few pieces of rock and so forth. But to have expressed generally that any defect in these works which are intended and recognized by the judgment as being for the complete protection of the plaintiffs against further occurrences causing damage to their land and buildings could be compensated in damages is quite another matter, and I think it would be extremely dangerous, having regard to the terms in which the judgment has been framed, to allow possible claims resulting from defects in these works to be assessed now by damages which I think, on the construction of the judgment, the learned judge never intended should be so assessed. The result is, in my opinion, that there is no objection to this particular order. That being so and the making of the order not resulting in my opinion in creating an obligation on the defendants to repair, but such obligation resulting from the position in which the defendants are under the judgment,

there is no sufficient ground for setting aside the order which the learned judge has made. The appeal therefore, I think, ought to be dismissed.

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SCRUTTON L.J. I propose only to state very shortly the reasons why I do not feel able to interfere with the order that has been made by the learned judge in the Court below in this case.

The defendants tipped on the land of the plaintiffs on the side of the hill a large tip of colliery spoil. Having done that, the colliery spoil wandered down the mountain side and was likely to continue wandering when two writs were issued, one by the Attorney-General on behalf of the public who saw their road below threatened and one by the plaintiffs, the owners of land below, and very sensibly the parties agreed at once to do certain works: (1.) to stop the wandering spoil from continuing its wanderings and (2.) to stop the remainder of the tip, which was then reposing on its original site, from going down the hill after the part of the tip which had started; and I should think, now that one looks at the matter and knows what has happened, that the defendants would have been very prudent if they had at once paid the whole of the costs of that and of the damage, and had not gone on with the very expensive litigation which has only benefited the lawyers and spoiled the pockets of their shareholders. That of course is being wise after the event, but one is tempted to question now whether it would not have been better for them to have continued the remedial works instead of going to the House of Lords to settle the particular question they are now trying to elucidate.

The question on this particular order arises in this way. The remedial works which were done under the consent order were executed and for a time stopped the further movement of the spoil that had begun to come down the hillside and stopped the part of the tip which remained in position from also coming down the hillside, and the cost of those remedial works was provided for by an agreement between the parties and falls on the defendants. But now one drain has become

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blocked in some way and the learned judge has ordered the defendants to clear it out—and as a matter of fact the defendants have done the work. But they are anxious to elucidate their further position, and they have brought a sort of quia timet appeal for fear that a further order should be made against them, and they say that they ought not to be ordered to clear any drain or to do any of the remedial works in future. Now I have had a recent case in this Court in which judgment has not yet been given, and have been forced by the lengthy arguments of counsel to try and find out on what principle the Chancery Court does act as to the mandatory injunctions it will grant and the mandatory injunctions it will not grant; and I have found it a task of very great difficulty. I hope counsel who have addressed us to-day will not be offended when I say that even their arguments have not entirely removed that difficulty from my mind. A wrongdoer who has either broken his contract or committed a tort may be ordered by the Court not to pay the damages thereby caused, but to do acts either to fulfil his contract, sometimes known as specific performance, and sometimes by a mandatory injunction to do certain works, or to put right the tortious wrong that he has committed. Some orders the Chancery Court will as a matter of practice make, and others it will not make. As a matter of jurisdiction it seems that the Court has the right to make any such order, but in practice it does not make certain orders and does make others. In practice it has never, as far as I can find, drawn the line between what orders it will make and what orders it will not make. It has said that as a general rule it will not make orders to do undefined works which may require continuous supervision in the sense of continuous applications to see whether the undefined works ordered to be done are or are not being carried out, but it has sometimes ordered specific works to be erected and maintained. I mentioned in the argument and I mention again one case which has been followed in other cases—namely, *Greene* v. *West Cheshire Ry. Co.* (1), where the railway

(1) L. R. 13 Eq. 44.

company was ordered to construct and for ever maintain at their own expense a siding of specified length, and as far as I can find, if the works can be exactly specified and are of such a character that the maintenance or repair is slight, the Court will in some cases make an order which involves future maintenance, though it cannot be foreseen at the time when the order is made exactly what maintenance will be required, and when and though that involves that applications from time to time may have to be made to the Court to supervise the carrying out of the order. As far as I can find the Court has never defined in one way or the other, and perhaps cannot define, exactly where it will draw the line as to which order it will make and as to which order it will not make. In this particular case the original application made to Sargant J. was to execute such works as might be necessary permanently to protect the buildings and other erections of the applicants on the mountain side or otherwise to abate the nuisance caused by the acts of the defendants or to keep open the present works thereon and therein. Mr. Romer, for the plaintiffs, agrees, I think, that that application goes far beyond the existing practice of the Court. It is for work very vaguely defined to be carried out over a long time. On the other hand the order that has been made is to restore the remedial works by clearing out the manhole at the top of the drain marked "B" to "B" in plan A and to put that drain in working order. Now on the best consideration I can give to the matter that particular order does come within the practice of the Court. The original works are specified, the exact thing to be done is specified, the clearing an agreed and specified drain; and in a matter in which the practice is very vague I do not think it right to interfere with the order of the learned judge, who is very familiar with Chancery practice, and who has thought that the proper way of dealing with the wrong undoubtedly committed by the defendants is to order them to maintain in that particular respect at this particular time the specified work which has been done by agreement between the parties. As I say, I doubt whether the peculiar

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facts of this case will make it a precedent for any other case; and I cannot think that it is the duty of the Court on an application for this one particular repair to lay down a code of rules for the future behaviour of the defendants in redressing the wrong they have caused by allowing their colliery tip to slip.

For these reasons I agree that we cannot interfere with the judgment of the learned judge in the Court below.

Appeal dismissed.

Solicitors for the appellants: *Ingledew, Davies, Sanders & Brown, for Ingledew & Sons, Cardiff.*

Solicitors for the respondents: *Rider, Heaton, Meredith & Mills.*

W. I. C.

C. A. 1922 *Feb.* 8, 9; *March* 22.

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[1921. G. 248.]

Landlord and Tenant—Agreement for Lease—Construction—Tenancy from Year to Year—Option of perpetual Renewal—Repugnancy—Claim for Declaration without consequential Relief—Right to specific Performance—Absence of Claim in Pleadings.

In March, 1917, the owner of a house under a lease expiring in 1975, let a portion of the premises to the defendant for one year from March 25, 1917, with an option to continue for two years from March 25, 1918, on giving two months' notice of his intention. The defendant afterwards proposed to continue for one year from March 25, 1918, with an option to continue for a further year from March 25, 1919, on giving two months' notice before that date. The landlord accepted this. The agreement was contained in two letters. On January 23, 1919, after further negotiation by correspondence, a written agreement was signed by the parties. It recited that the tenant was prepared to continue his tenancy for a further year from March 25, 1919, if the landlord would give him an option to continue the tenancy after March 25, 1920, from year to year, provided that each year before March 25 the tenant gave one month's notice of his intention to continue. The agreement then provided (1.) that the tenant exercised his option to continue the tenancy until March 25, 1920; (2.) that the landlord granted the tenant the option to continue the tenancy after March 25, 1920, from year to year, provided that each year before March 25 the tenant gave one month's notice

in writing of his intention to continue, and that in the event of the tenant desiring to put an end to the agreement on any March 25 he should give two months' notice of that his intention. In August, 1920, the plaintiff acquired the head lease, and on September 21, 1920, gave the defendant notice to quit on March 25, 1921. The defendant disputed the plaintiff's right to give this notice, and on January 6, 1921, he gave the plaintiff notice that he exercised his option to continue for another year. The plaintiff then brought an action, claiming (1.) a declaration that the defendant was not entitled to a perpetual right of renewal; and (2.) a declaration that the plaintiff's notice to quit was effective to determine the tenancy on March 25, 1921. The defendant counterclaimed for a declaration that he held as tenant from year to year with the right of perpetual renewal during the term of the head lease. The plaintiff did not claim possession, and the defendant did not claim specific performance.

Younger L.J. (sitting for Astbury J.) held, upon construction of the agreement, that the option therein contained, when once exercised, created a tenancy from year to year with the ordinary incidents, and that the right of the tenant to a perpetual renewal, being repugnant to such a tenancy, must be rejected. He, therefore, declared that the notice to quit was effectual to determine the tenancy on March 25, 1921, and he dismissed the counterclaim:—

Held, by the Court of Appeal, that the true effect of the agreement was to extend the option to continue, at its date limited to one year, to a succession of reversionary terms, each for one year certain, provided the requisite notice was given before the expiration of each succeeding term. It did not create a tenancy from year to year. Upon this construction neither party was entitled to the declaration claimed by him, and both claim and counterclaim must be dismissed.

Decision of Younger L.J. [1921] 2 Ch. 549 reversed.

APPEAL from the decision of Younger L.J. sitting as an additional judge of the Chancery Division for Astbury J. (1)

The question was as to the construction of an agreement of tenancy made by the defendant with a Mrs. Styles, whose interest as landlord had been acquired by the plaintiff. The facts are fully stated in the report of the case in the Court below.

More shortly stated they were as follows.

In 1917, Mrs. Styles, an elderly lady, was the owner of a lease of 129 Mount Street, for a term expiring in 1975. By an agreement in writing dated March 23, 1917, she agreed to let and the defendant, who was a solicitor, agreed to take a portion of the premises for one year from March 25, 1917, with the option to continue as thereinafter defined, at the

(1) [1921] 2 Ch. 549.

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yearly rent of 350*l*. It was provided that: "The Tenant shall have the right to continue on the same terms as a tenant of the demised premises for a further period of two years, calculated from the twenty fifth March One thousand nine hundred and eighteen, but the Tenant shall give two months notice to the Landlord as to whether he will continue the tenancy or not." The first year of this tenancy expired on March 25, 1918. In January of that year, the parties agreed that, instead of renewing the tenancy for two years certain, the defendant should be entitled to renew for one year, with an option to continue for a further year upon the same terms as to length of notice and otherwise, as expressed in the agreement of March 23, 1917. The term of one year certain, thus created, expired on March 25, 1919, the tenant having an option, on giving the proper notice, to continue the tenancy for another year, ending on March 25, 1920.

On January 23, 1919, as the result of a correspondence between the parties, a memorandum of agreement at the foot of the agreement of March 23, 1917, was signed by both parties, and it was on the construction and effect of this agreement that the question mainly turned. It was as follows:—

"Memorandum of Agreement between the above named parties. Whereas the Tenant in consideration of the Landlord giving him an option to continue the tenancy for one year from the twenty fifth day of March, One thousand nine hundred and nineteen to the twenty fifth day of March, One thousand nine hundred and twenty, duly gave notice to continue his tenancy until the twenty fifth day of March, One thousand nine hundred and nineteen. And whereas the Tenant has intimated to the Landlord that he is prepared to continue his tenancy for a further year on the same terms as are contained in the above agreement from the twenty fifth day of March One thousand nine hundred and nineteen to the twenty fifth day of March One thousand nine hundred and twenty if the Landlord will agree to give him an option to continue the tenancy after the twenty fifth day of March One thousand nine hundred and twenty from year to year

on the same terms as are contained in the above written agreement provided that each year before the twenty fifth day of March the Tenant gives one month's notice of his intention to continue his tenancy. And Whereas the Landlord has agreed to give the Tenant such option subject to the Tenant agreeing that in the event of his not intending to exercise the option and leave the premises on any twenty fifth day of March he will give at least two months notice thereof. Now it is hereby agreed as follows: (1.) The tenant hereby exercises the option granted to him by the Landlord to continue the tenancy created by the above Agreement on the terms contained in such Agreement until the twenty fifth day of March One thousand nine hundred and twenty. (2.) For the consideration aforesaid and in pursuance of the Agreement herein recited the Landlord hereby grants the Tenant the option to continue the tenancy after the twenty fifth day of March One thousand nine hundred and twenty from year to year on the same terms as are contained in the above written Agreement provided that in each year before the twenty fifth day of March the Tenant gives one month's notice in writing of his intention to continue the tenancy and that in the event that the Tenant desires to leave the premises and put an end to the above Agreement on any twenty fifth day of March in any year, he will give two months notice of that his intention."

Under the first clause of the agreement, the first of the successive years expired on March 25, 1920. In February of that year the defendant duly exercised his option of continuing his tenancy for another year expiring on March 25, 1921. In August, 1920, Mrs. Styles assigned her interest in the house to the plaintiff. On September 21, 1920, the plaintiff gave the defendant notice in writing to quit on March 25, 1921. The defendant disputed the plaintiff's right to give this notice, and on January 6, 1921, he gave formal notice of his intention to continue his tenancy for a further year expiring on March 25, 1922.

The present action was commenced on January 24, 1921. By the statement of claim the plaintiff claimed: (1.) a

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declaration that upon the true construction of the memorandum indorsed on the said agreement as aforesaid the defendant was not entitled to a perpetual renewal of the tenancy created by the said agreement; (2.) that the agreement might be rectified so as to provide that the option to the defendant should be for one renewal on a yearly tenancy and not otherwise [this claim was abandoned at the hearing]; and (3.) a declaration that the tenancy was effectually determined on March 25, 1921, by the plaintiff's notice to quit. In para. 7 certain allegations were made which, if established in fact, might be held to afford a defence to an action by the defendant for specific performance of the agreement of January 23, 1919. The plaintiff did not claim possession, or in fact any other relief in addition to the declarations for which he asked.

By the statement of defence and counterclaim, the defendant disputed the validity of the plaintiff's notice to quit, and insisted on his right to a perpetual renewal of the tenancy, and he put in issue the allegations in para. 7 of the statement of claim. By his counterclaim he claimed as follows: "A declaration that upon the true construction of the said agreements of the 23rd day of March, 1917, and the 23rd day of January, 1919, the Plaintiff holds the premises comprised therein as tenant from year to year with the right of perpetual renewal of his said tenancy during the continuance of the term vested in the Plaintiff under his ground lease." He did not claim specific performance of the agreement.

Younger L.J. held that the agreement of January 23, 1919, created a tenancy from year to year with all its incidents, and that the perpetual right of renewal was repugnant to such a tenancy and must be rejected. He therefore declared that the notice to quit was effectual to determine the tenancy on March 25, 1921. He accordingly dismissed the counterclaim, and ordered the defendant to pay the costs of the action and counterclaim.

The defendant appealed. By his notice of appeal he renewed his contention that upon the true construction of

the agreement he held the premises as tenant from year to year, with a perpetual right of renewal. It appeared at the hearing of the appeal that rent accruing due subsequent to March 25, 1921, was paid by the defendant to and accepted by the plaintiff, who gave the defendant an unqualified receipt therefor, and thus rendered it impossible to enforce his notice to quit.

Hildyard K.C. and *Roope Reeve K.C.* for the appellant.

Micklem K.C. and *Copping* for the respondent.

The arguments used in the Court below were substantially repeated, the following additional authorities being cited: *Hand* v. *Hall* (1); *Manchester Brewery Co.* v. *Coombs* (2); *Swain* v. *Ayres.* (3)

LORD STERNDALE M.R. This appeal from Younger L.J. sitting for Astbury J. raises a question of some difficulty as to the rights of the parties under an agreement made by the defendant with a Mrs. Styles, whose interest has since been acquired by the plaintiff. The agreement is by no means easy to construe, because of the vagueness and ambiguity of its terms.

[The Master of the Rolls then stated the facts and continued:] The learned judge doubted if this was a proper case for a declaration with no consequential relief. I agree with him that claims for declaration should be carefully watched. Properly used, they are very useful; improperly used, they almost amount to a nuisance. In this case, however, as the matter stood at the issue of the writ, I think the plaintiff's claim for a declaration was a convenient method of ascertaining the legal position of the parties without waiting for the time when the notice terminated, and it might well be for the benefit of both parties to have it so determined.

Since the issue of the writ, matters have occurred, not mentioned to the learned judge, which might prevent the

(1) (1877) 2 Ex. D. 355.
(2) [1901] 2 Ch. 608.
(3) (1888) 21 Q. B. D. 289.

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Court in its discretion from making that declaration, even if the plaintiff were right in his contention as to the meaning of the agreement.

The first, and most difficult, question is whether the agreement constitutes a tenancy from year to year after March, 1920, or whether it constitutes only a tenancy for a further year, that is, to March, 1921, with an agreement giving a right in equity, on proper notice, given in each year, to continue tenancies for a year indefinitely within the limits of the leasehold interest. It is to be noted that the defendant in his counterclaim, and in his notice of appeal, claims a declaration that he is tenant from year to year, with the right of perpetual renewal. I agree with the learned judge that the two things are inconsistent, and that there cannot be a tenancy from year to year, qualified by a right of perpetual renewal which deprives the tenancy of a necessary incident, that is to say, the right of the landlord to terminate it by a six months' notice to quit.

The foundation, however, of the plaintiff's claim, is that the tenancy is one from year to year, and therefore it is necessary to see whether it is so or not. If it were not, the tenancy would determine in March, 1921, if notice to continue were not given, whether a notice to quit were given or not, and such a notice could hardly be declared to be effectual to determine a tenancy which would in any event determine without it.

Younger L.J. has held that the option given in the memorandum, when once exercised, created a tenancy from year to year, with all the incidents attaching to such a tenancy, and that the words giving an option to the tenant to continue, must be rejected as repugnant to such a tenancy, while the last words of the clause only reduce the notice to be given by the tenant from six months to two, and naturally, he relies strongly upon the use of the words " from year to year " in the memorandum. His view is expressed shortly and clearly in these words, which I quote from his judgment (1): " In my view the continuance as tenant from year to year is

(1) [1921] 2 Ch. 562.

here not only the governing provision of the clause. It is a term of art with a very definite meaning. Moreover it is entirely consonant with the short term of tenancy to which by the memorandum it is made appendant, and to ignore the words, as the defendant's construction does, and thereby introduce a most incongruous arrangement of absolutely indefinite duration, is to bring about a result which no Court of construction would impose upon the parties, unless the language employed imperiously required it." No doubt the words "from year to year" are well known, and may be called a term of art with regard to tenancies, unless in the document under consideration there is something pointing to a different meaning. It may also be forcibly argued that when these words are used by a solicitor, who may be presumed to appreciate their force, he should be held to their strict meaning, especially when they are used in an agreement made by him with an old lady who had no professional advice, and when with any other meaning they impose on her an onerous and improvident agreement. It is, however, only fair to the defendant to say that he does not appear to have acted at all as Mrs. Styles' solicitor, or to have exercised any pressure, or indeed persuasion, to induce her to enter into the agreement. It should also be remembered that he is seeking to enforce it, not against the lady herself, but against the plaintiff, who bought from her with full knowledge of it, and probably took it, and his chance of escaping from it, into consideration when estimating the price he would give.

All that I have to do, therefore, is to look at the words of the agreement, apart from any extraneous consideration, and form the best opinion I can upon their meaning. I have had, and have, great hesitation about it, made, of course, greater by the fact that I am differing from the learned Lord Justice, but I have come to the conclusion that they do not constitute a tenancy from year to year, and that a continuance from year to year is not the governing part of the clause. I think, looking both at the recitals and the operative part of the agreement, the governing idea is a tenancy for a year certain, to be renewed as such a tenancy

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each year by the notice mentioned, and that the proviso as to renewal on notice, shows that the words "from year to year" were not used in what I may call their technical sense. I think they can be read and should be read as "each year" or "every year." If the clause is to be read as if divided into two parts, one ending and the other beginning at the words "written agreement," then there is a tenancy from year to year, with an attempt to impose upon it repugnant conditions; but I do not think that is the right way to read it. I think it must be read as one, and, so read, I think it bears the construction which I have put upon it, and shows that, whatever the words, the real intention was not to create a tenancy from year to year.

I think therefore, that no declaration should be made in favour of the plaintiff. I do not think that the Court should declare an unnecessary notice effectual.

There is another consideration to which I have alluded, which was not before Younger L.J. Since the writ, the plaintiff has accepted rent from the defendant for a period after the expiration of the notice, and has so waived it. Granting a declaration is a matter of discretion, and I do not think the Court should declare a notice to have been effectual when the plaintiff by his own act has, since the action began, deprived it of any effect it ever could have had.

It remains now to deal with the defendant's counterclaim, and I do not think he is entitled to any declaration. His position was, as I think, that he had a legal tenancy till March, 1921 (now perhaps extended to March, 1922, by receipt of rent), with a right in equity to ask for (not necessarily to obtain) specific performance of an agreement to extend his tenancy for another year and so on each year. He has not got a decree for specific performance; he has not asked for it, and cannot, in my opinion, do so on this appeal, as it was clearly pointed out in the Court below that if such a decree were asked for, it would be opposed, and further evidence would be called. I express no opinion whatever as to whether or not the Court would

enforce the agreement in the defendant's favour by specific performance.

It was argued, however, for the defendant, that it was unnecessary for him to obtain such a decree, because, following the decision of *Walsh* v. *Lonsdale* (1), and other cases to the same effect, his agreement giving him a right in equity to a continuance of his tenancy, put him on the same footing as if he had an actual tenancy. There are expressions in several cases which seem to support this contention: see per Cotton L.J. in *Lowther* v. *Heaver* (2), and per Field J. in *In re Maughan* (3), and per Chitty J. in *Allhusen* v. *Brooking*. (4) But I think it will be found in all these cases that there was no dispute, and that it was taken as admitted that specific performance of the agreement would be granted as a matter of course. On the other hand, in *Swain* v. *Ayres* (5), it was said that the question whether specific performance would be granted should be raised by distinct allegations in the pleadings: see per Lord Esher M.R. at p. 294 and Lindley L.J. at p. 295. Perhaps Lord Esher's words must be rather discounted by what he said at p. 293, which seems to have rather an opposite effect. I think this is correct in all cases except those in which the sole question is that of construction, and there is no dispute that, the construction once determined, the Court would of course make a decree. This is not a case of that sort, as appears upon the pleadings, which allege facts which might be raised as a defence to a claim for specific performance, and from the course taken at the trial, to which I have already alluded.

I think therefore, that both the claim and the counter-claim should be dismissed, and, except as to construction of the agreement, on which I regret to say I differ from Younger L.J., I do so without intending to prejudice the rights of either party in any future proceedings at law or in equity.

I think the appeal should be allowed by setting aside the

(1) (1882) 21 Ch. D. 9.
(2) (1889) 41 Ch. D. 248, 264.
(3) (1885) 14 Q. B. D. 956, 958.
(4) (1884) 26 Ch. D. 559, 565.
(5) 21 Q. B. D. 289.

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order made by Younger L.J., and dismissing both claim and counterclaim, and that there should be no order for costs either here or below.

WARRINGTON L.J. This is an appeal from a judgment of Younger L.J., sitting as an additional judge of the Chancery Division, by which it was declared that a certain notice to quit was an effectual notice to determine a certain tenancy on March 25, 1921.

The decision of the learned Lord Justice was based upon his view of the construction of the tenancy agreement on which the contest turned—namely, that it created a yearly tenancy, determinable on the part of the landlord by a six months' notice, and that what he regarded as a perpetual right of renewal attached to such a tenancy, was repugnant, and must be rejected.

The appellant asks us to adopt a construction in accordance with which he, the tenant, would be entitled to a succession of tenancies each for one year, taking effect at the expiration of the previous one, and dependent for their existence upon notice being given of the tenant's desire for a fresh tenancy, one month before the expiration of the current tenancy for the time being.

I propose first to express my view as to the construction of the agreement, and then to consider what order ought to be made, having regard to the nature of the action, the position on the pleadings, and the manner in which the matter was dealt with at the trial. [His Lordship stated the facts as to the agreement and its inception and continued :] I desire to point out—I have tried to emphasise it in reading the agreement—the repetition, over and over again, of the expression "continue the tenancy." At the date of this agreement, the defendant was in possession of the premises for a term of one year, with an option to continue for one year more, and for that period only. Younger L.J. has held that the agreement, on its true construction, created a tenancy from year to year, with the ordinary legal incidents, including the right of the landlord to determine it on giving six months'

previous notice, and that the option thereby purported to be given to the tenant, was inconsistent with the landlord's legal right of determination under a tenancy from year to year, and therefore repugnant and void.

With all respect, I cannot agree with this view. Having regard to the relative position of the parties at the time, I am of opinion that the true effect of the agreement was to extend the option, at its date limited to one year, to a succession of years, limited of course by the length of the landlord's own interest in the premises, but otherwise undefined, and it purported therefore to create a succession of reversionary terms, each for one year certain, provided the requisite notice was given prior to the expiration of each of those terms. If the tenant failed to give the notice exercising his option, the tenancy would, in my opinion, determine at the expiration of the then current year, notwithstanding the failure of the tenant to give the two months' notice of his intention to leave the premises, and the landlord's right in consequence of his breach of the stipulation in this behalf, would be to claim damages only.

By the Statute of Frauds, every lease of corporeal hereditaments for a term exceeding three years from the making thereof, was required to be in writing, and by the statute 8 & 9 Vict. c. 106, a lease required by law to be in writing, was rendered void at law unless made by deed. In my opinion the agreement in question, construed as I think it ought to be, purported to create a term exceeding three years from the making thereof, and was therefore void at law as a lease.

It is true that in *Hand* v. *Hall* (1) it was held in this Court that a somewhat similar agreement to that now in question did not require to be by deed in order to create a legal tenancy, but that case turned on the construction of the agreement, which the Court held was severable into two parts, so that the term originally created was for less than three years, and it was this term only which was in question. In my opinion that case is distinguishable from the present, in

(1) 2 Ex. D. 355.

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which the question is not as to the validity of the original tenancy, but of the subsequent tenancies created by notice. But though void at law, the agreement would in equity be held to operate as an agreement for a lease, and as such, to create an equitable tenancy on the terms expressed in the agreement, provided—and this is an essential condition—that it be found to be an agreement of which a Court of equity would decree specific performance: see *Walsh* v. *Lonsdale* (1) and the very valuable judgment on this branch of the law of Farwell J. in the *Manchester Brewery Co.* v. *Coombs* (2), and in particular the passage at p. 617, in which the doctrine above referred to is stated and explained at length.

Having thus expressed my view as to the construction and effect of the agreement, it is necessary to consider some further facts with a view to determining whether any, and, if any, what effective relief can properly be given to either party in the present proceedings. [His Lordship stated the further facts, and continued:] In my opinion the order of Younger L.J. should not have been made. On the true construction of the agreement as I hold it to be, the notice to quit was ineffectual. It is true that at law there was no such tenancy as I think the agreement purported to create, and it may well be that at law there was, after March 25, 1920, a simple tenancy from year to year, determinable by a six months' notice. But at the date of the judgment it was an open question whether the agreement could be specifically performed. It is true that the right to specific performance was not pleaded: see *Swain* v. *Ayres*. (3) But on the other hand, the case made by the plaintiff rested on the assumption that a legal tenancy—namely, a tenancy from year to year—was created by the agreement, and on that footing the question as to specific performance was immaterial.

It seems to me that both parties have misconceived their positions, and each has made a claim which cannot be granted. I think the only order we can make will be to

(1) 21 Ch. D. 9. (2) [1901] 2 Ch. 608.
(3) 21 Q. B. D. 289, 295.

discharge the order appealed from, and make no order on either claim or counterclaim as to costs or otherwise, and that there should be no costs of the appeal.

Our views as to the construction and effect of the agreements will be a guide to the parties in considering what, if any, action they will respectively take, but I think it better not to make any declaration thereon, no relief being asked by either side founded on such declaration, nor, if it were asked for, is there any relief that, on the present state of the pleadings, could be given.

SCRUTTON L.J. Mrs. Styles, an elderly lady, was in 1917 the tenant of 129 Mount Street, under a lease expiring in 1975. In March, 1917, she let to Mr. Edmund Spyer, a solicitor, the second and third floors as a service flat. The agreement was for one year from March 25, 1917, with an option to Mr. Spyer to continue on the same terms as a tenant for two years from March 25, 1918, on giving two months' notice to the landlord of his intention so to continue. The term "the landlord" in the agreement was to include her assigns. When the time arrived to exercise the option, Mr. Spyer was not anxious to bind himself for two years. He therefore proposed to continue for one year from March 25, 1918, with an option to him of continuing for a further year from March 25, 1919, on giving two months' notice before that date. The landlord accepted this. No formal agreement was drawn up; the agreement was contained in two letters. Early in 1919 negotiations were carried on by letters, which resulted in an agreement in writing dated January 23, 1919. The tenant was at that time a tenant for a year certain, with an option to the tenant to continue for another year, that is with an agreement by the landlord to grant the tenant another year's tenancy if the tenant asked for it. The agreement recited that the tenant was prepared to continue his tenancy for a further year from March 25, 1919, if the landlord would agree to give him an option to continue the tenancy after March 25, 1920, from year to year, provided that each year before March 25 the tenant

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gave one month's notice of his intention to continue his tenancy. The operative part then continues: (1.) that the tenant exercises his option to continue the tenancy until March 25, 1920; (2.) that the landlord grants the tenant the option to continue the tenancy after March 25, 1920, from year to year, provided that each year before March 25, the tenant gives one month's notice in writing of his intention to continue the tenancy, and that in the event that the tenant desires to leave and put an end to the above agreement on the twenty-fifth day of March in any year, he will give two months' notice of that his intention. In August, 1920, Mrs. Styles sold her leasehold interest to the plaintiff, who on September 21, 1920, gave Mr. Spyer notice to quit the premises on March 25, 1921. Mr. Spyer denied the plaintiff's right to give this notice. On January 6, 1921, Mr. Spyer gave the plaintiff notice that he exercised his option to continue his tenancy for a further year, and on January 24 the plaintiff issued a writ against Mr. Spyer asking: (1.) a declaration that Mr. Spyer was not entitled to a perpetual renewal of his tenancy; (2.) rectification of the agreement; (3.) a declaration that the notice of September 21, 1920, was an effective notice to determine the tenancy on March 25, 1921. Mr. Spyer counterclaimed a declaration that he held as tenant from year to year with the right of perpetual renewal of his tenancy during the term of the plaintiff's lease.

The case came before Younger L.J., sitting for Astbury J., on July 19, 1921. The learned Lord Justice, after pointing out that the plaintiff was not claiming possession, for at the date of the writ he was not entitled to it, and the defendant was not asking for specific performance, though on his view of the contract its validity depended on whether such a decree could be made, said that the only question properly open for decision was whether the defendant at the date of the writ held upon a tenancy from year to year, expiring on March 25, 1921, by reason of a valid notice to quit expiring on that day. He answered that question by making a declaration that the notice to quit was an effectual notice to determine the tenancy. This Court elicited by inquiry the fact, which

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the learned judge was not told, that at midsummer, 1921, shortly before the judgment was delivered, the plaintiff had received the rent for the quarter after the notice to quit expired, and had given an open receipt for it. This fact appeared to make the declaration given, if right at the date of the writ and on March 25, 1921, useless, as the receipt of subsequent rent waived the notice to quit. On the other hand, the tenant, whose argument was that though he had not a tenancy, but only an agreement to grant one, this agreement was one of which the Court would grant specific performance, and was therefore under the doctrine of *Walsh* v. *Lonsdale* (1) and *Lowther* v. *Heaver* (2) as good as a lease, did not ask for specific performance. The plaintiff, while asking for rectification, which was hopeless in the absence of any evidence of mutual mistake, alleged certain facts as to the age of the original lessor, and the absence of legal advice to her which might be material on a question of specific performance. This question, however, was not gone into at the trial. But in *Swain* v. *Ayres* (3), where it was attempted to apply the doctrine of *Walsh* v. *Lonsdale* (1) that an agreement for a lease which a Court of equity would specifically perform had the same effect as the lease, if granted, two members of the Court of Appeal said that the question whether specific performance would have been granted should be raised by specific allegations on the pleadings.

What then is the position? The plaintiff, not asking for possession, asks that a notice to quit should be declared effective which he has waived by receipt of rent for a period subsequent to its expiry, and for a declaration as to construction of the agreement which, as appears hereafter, I think erroneous. The defendant, who has not a lease, but an agreement for a lease, and whose rights therefore depend on the lease being one of which the Court will grant specific performance, has not asked for specific performance: see besides the *Walsh* v. *Lonsdale* (1) line of cases, *Zimbler* v. *Abrahams*. (4)

(1) 21 Ch. D. 9.
(2) 41 Ch. D. 248.
(3) 21 Q. B. D. 289, 294, 295.
(4) [1903] 1 K. B. 597.

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In my view, the only thing to do with such a misconceived action is, setting aside the judgment of Younger L.J., to dismiss both claim and counterclaim and give no costs to either side. But I appreciate that in any subsequent proceedings, whether for possession or for specific performance, a question of construction of the agreement will arise, and I am unwilling, as the case has been argued before us, that this argument should be entirely wasted. I therefore express my views of the construction of the agreement, on which I do not agree with the view taken by Younger L.J.

It is quite clear that at the time the agreement of January 23, 1919, was signed, Mr. Spyer had a tenancy for a year certain, with an agreement by the landlord to grant him a second year's tenancy on the same terms, if he asked for it by a given date, such second year's tenancy to be accompanied by a similar agreement for the grant of a third year's tenancy, and so on. This is clearly not a "tenancy from year to year" as known to lawyers, defined by Parke B. in *Oxley* v. *James* (1) as "a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract, and parcel of it." Such a tenancy is for a year certain, terminable by either side by six months' notice expiring at the end of the year, involving, if such notice is not given, another year's tenancy terminable in the same way. But in this agreement, if no one gives a notice, the tenancy expires. The plaintiff's contention was that this case involved such a tenancy from year to year, terminable by the landlord at six months' notice, by the tenant at two months' notice, each expiring at the end of the term. His trouble was to fit into this the option granted by the landlord to the tenant to continue the tenancy on one month's notice. He said this could only be exercised if the landlord had not given notice to determine the tenancy; but in this case it would not be wanted, for the tenancy from year to year would continue. Moreover, the power to the tenant to determine was on two months' notice. If he did not give this notice, in a tenancy from year to year, his tenancy would continue; what then

(1) (1844) 13 M. & W. 209, 214.

was the use of a power to continue it on one month's notice ? If I am simply to construe the words of the agreement, it seems to me to contemplate a year's tenancy, continuing from year to year, at the tenant's will expressed one month before the end of each year. But the continuation depends, not on a grant, but on an agreement to grant if the tenant so requires. In other words, the agreement is to continue from year to year at tenant's option the existing one year's tenancy, not to continue at tenant's option the tenancy from year to year. As this continuation rests on agreement to grant, and not on a grant, it is an equitable, not a legal, right. It may involve a right of perpetual renewal at tenant's option, a construction which Sir R. Arden M.R. in *Baynham* v. *Guy's Hospital* (1) said that the Courts of England leant against, unless it was perfectly clear that the covenant had such a meaning. But in this case the opposite construction appears to involve such complicated absurdities that the Courts of England should not lean towards it, however much they desire to lean against perpetual renewal. Whether the agreement is one which the Court will specifically perform I do not determine. I should not myself like to ask an old lady to sign an agreement drafted by myself, giving me a very extensive right in language not suited to the intelligence of old ladies, without seeing that she had independent advice and understood what she was doing. But Mr. Edmund Spyer may take a different view of what is right and proper. And what may be the result of any evidence tendered on a claim for specific performance, or as to the operation of any subsequent notice to quit, or notices to renew, I cannot foresee. With this expression of my opinion, I think the judgment below should be set aside and both claim and counterclaim dismissed without costs.

Solicitors for the appellant : *Guedalla, Jacobson & Spyer.*
Solicitors for the respondent : *H. J. S. Woodhouse & Co.*

(1) (1796) 3 Ves. 295.

G. A. S.

SARGANT J.

1922

March 3, 7, 22.

WOODIFIELD *v.* BOND.

[1921. W. 3727.]

Emergency Legislation—Mortgage—Proposed Sale by Mortgagee—Application to restrain—"Proper state of repair"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 7.

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 7, provides: "It shall not be lawful for any mortgagee under a mortgage to which this Act applies, so long as— . . . . (*c*) the mortgagor keeps the property in a proper state of repair . . . . to call in his mortgage or to take any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security, or for recovering the principal money thereby secured . . . .":—

Held, that "the proper state of repair," in which a mortgagor is required to maintain the mortgaged premises in order to obtain the benefit of the section, must be measured by the general condition of the property at the date of the mortgage and must not be extended beyond the preservation of the property in a state corresponding with what existed at that date. It does not involve a rebuilding of the whole or any integral part of the structure, as by the provision of a new roof or the insertion of a damp course throughout the length of the walls.

ACTION.

By deed dated February 16, 1918, the defendant Bond conveyed to the plaintiff in fee the Home Farm, Longham, Dorset, in consideration of the purchase price of 650*l.* Of this sum 180*l.* was paid in cash, and by a deed of mortgage dated February 18, 1918, the plaintiff mortgaged the property to the defendant Bond to secure the balance of 470*l.* and interest. The mortgage contained a clause providing that the mortgagee was not to call in the principal for three years if the interest was paid punctually.

The property consisted of a small dwelling house with some farm buildings and about 1½ acres of garden and orchard and the rateable value was 21*l.* per annum. The house had been built between 150 and 200 years ago. It had been in the ownership and occupation of the defendant Bond for three or four years before the sale to the plaintiff.

On March 10, 1921, the defendant Bond gave formal notice to the plaintiff requiring repayment of the principal of the mortgage within three calendar months. She failed to

comply and the defendant Bond instructed the defendants Hankinson & Son, auctioneers, to sell the property by auction. It was advertised for sale on October 13, 1921, but on October 11, 1921, the plaintiff commenced this action against the defendant Bond and the auctioneers claiming an injunction to restrain the sale on the ground that it was rendered unlawful by s. 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and moved for an interim injunction.

At the hearing of the motion on October 28, 1921, the defendant Bond contended that, in view of the language of s. 12, sub-s. 2, of the Act of 1920, the Act had no application as between mortgagor and mortgagee except when the property was let to a tenant. Sargant J. declined to adopt this construction and continued the ex parte injunction previously obtained by the plaintiff until the hearing of the action. (1)

By his defence the defendant Bond took the additional point that the plaintiff was not entitled to the protection of s. 7 of the Act, because she was not keeping and had not at any material time kept the premises in a proper state of repair. And he counterclaimed for the enforcement of the mortgage by foreclosure or sale.

The nature of the evidence as to disrepair is fully stated in the judgment. Shortly, the evidence adduced on behalf of both the plaintiff and the defendant Bond was that the house was old and in an extremely bad state of repair; but evidence was given on behalf of the plaintiff that the house was in an excessively bad state of repair structurally at the time of the mortgage and was in no worse condition at the present time.

A. H. Woolf for the plaintiff. The plaintiff is entitled to have the defendant Bond restrained from exercising any right of foreclosure or sale by virtue of s. 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. (2) The

(1) [1921] W. N. 309.

(2) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 7: "It shall not be lawful for any

SARGANT J. 1922 WOODIFIELD v. BOND.

mortgage is one to which the Act applies: see s. 12, sub-ss. 2 and 4. It has been suggested that the Act does not apply, because the house is not "let" within s. 12, sub-s. 2, but this Court has already decided this contention adversely to the defendants on motion. (1) The defendant Bond now contends that the plaintiff is not entitled to the benefit of s. 7 of the Act, because she has failed to keep the property "in a proper state of repair"; it is submitted that she has done so having regard to the state of disrepair of the house at the time of the mortgage. The mortgagor has sufficiently complied with the third proviso to s. 7 by maintaining the property in substantially the same condition as it was at the date of the mortgage.

H. B. Vaisey for the defendants. The plaintiff has failed to keep the mortgaged property "in a proper state of repair" within s. 7 of the Act. There is no definition of what is meant by this, although in s. 2, sub-s. 5, "repairs" are defined for the purposes of that section as meaning "any repairs required for the purpose of keeping premises in good and tenantable repair." The meaning of the words "proper state of repair" has never been considered in any reported case, except perhaps in *Walters* v. *White* (2), a case under the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915. The obligation of the mortgagor under the Act of 1920 is not limited by the fact that the premises were in disrepair at the date of the mortgage and it is immaterial that the defendant Bond previously occupied the premises. To keep premises in repair involves putting them into a state of repair first: *Crowe* v. *Crisford*. (3)

[SARGANT J. That may be so in the case of a covenant

mortgagee under a mortgage to which this Act applies, so long as—(*a*) interest at the rate permitted under this Act is paid and is not more than twenty-one days in arrear; and (*b*) the covenants by the mortgagor (other than the covenant for the repayment of the principal money secured) are performed and observed; and (*c*) the mortgagor keeps the property in a proper state of repair . . . . to call in his mortgage or to take any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security or for recovering the principal money thereby secured. . . . ."

(1) [1921] W. N. 309.

(2) (1917) 33 Times L. R. 154.

(3) (1853) 17 Beav. 507, 510.

to keep in repair, but different considerations apply to the construction of a public general statute.]

As between tenant for life and remainderman an obligation to keep in repair involves putting in repair premises that are in a state of disrepair: *Cooke* v. *Cholmondeley*. (1) The extent of the obligation as between landlord and tenant is discussed in *Proudfoot* v. *Hart*. (2)

[SARGANT J. Is not the object of the section to preserve the status quo, so that during the suspension of the mortgagee's rights his security may be preserved ?]

So to construe s. 7 is to treat "proper repair" as meaning "bad repair," if the premises were originally in a bad state of repair. The correct measure of obligation is that laid down in *Payne* v. *Haine* (3); and the mortgagor cannot avail herself of the Act, as she has not put the premises in good repair, even when the extent of repair required is measured by the age and class of the premises: see also *Jacob* v. *Down*. (4)

It is desired to resubmit formally the point of law taken on the motion.

Woolf in reply. In order to obtain the benefit of the Act, it is sufficient that the mortgagor has maintained the premises in at least as good a condition as at the time of the mortgage. The cases dealing with a covenant to keep in repair have no application to the proviso in s. 7, which is a condition imposed by a general statute and directed to maintaining the status quo. Further the covenant in *Proudfoot* v. *Hart* (2) was to keep in "good tenantable repair" and so leave the same at the expiration of the term, and in *Payne* v. *Haine* (3) to keep and at the expiration of the term deliver up "in good repair, order, and condition." Even in the case of a covenant to repair it has always been recognized that there was no obligation to give new subject matter: *Lurcott* v. *Wakely & Wheeler* (5); compare *In re Gaskell's Settled Estates*. (6)

Cur. adv. vult.

(1) (1858) 4 Drew. 326.
(2) (1890) 25 Q. B. D. 42, 50.
(3) (1847) 16 M. & W. 541, 545.
(4) [1900] 2 Ch. 156.
(5) [1911] 1 K. B. 905, 922.
(6) [1894] 1 Ch. 485.

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March 22. SARGANT J. delivered the following written judgment. The plaintiff here is suing to prevent the defendant Bond, who is a mortgagee, from exercising the power of sale in his mortgage contrary to the provisions of s. 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The defendants Hankinson & Son are merely auctioneers who were employed by the defendant Bond for the purposes of the intended sale. They are merely formal defendants; and it is admitted that their costs (which are trifling since they have appeared by the same counsel as the defendant Bond and have taken no separate part in the evidence or discussion) must be provided for either by the plaintiff or the defendant Bond in accordance with the result as between these parties.

So far as value and general character are concerned the property is admittedly within the protection of the Act; but two special defences have been raised. The first is that the property is in the actual possession and occupation of the plaintiff as mortgagor, and that the Act applies only to property that is let to a tenant. The second is, that the mortgagor has not kept the property in a proper state of repair. The point raised by the first defence was argued at length when the matter was before me on motion, and was for the purposes of that motion decided in favour of the plaintiff. (1) There has been no reargument of the point at the trial, but the defendant Bond has not abandoned it and will be entitled to rely on it should the case go higher. The second defence is that to which all the evidence at the trial was directed and with which alone I have now to deal. To do so it will be necessary to state the facts rather more fully.

The property is a small residential one at Longham, Dorset, and consists of a small house containing five bedrooms and two sitting-rooms with some farm buildings and something over one and a-half acres of garden and orchard. The house was built between 150 and 200 years ago. It was in the ownership and occupation of the defendant Bond (hereafter referred to as the defendant) for three or four years prior

(1) [1921] W. N. 309.

to the sale to the plaintiff, and was sold by him to her in September, 1917, for a sum of 650*l.*; but in consequence of some claim for a deficiency in the area of the land (for which an allowance was ultimately made) the conveyance to the plaintiff did not take place till February 16, 1918. At the time of the sale to the plaintiff the house was described by the defendant's agents, Messrs. Walters & Co., as being perfectly dry and in a good state of repair, and it was stated that there was inside sanitation and that the drainage was treated on the property and was quite satisfactory. The defendant's wife also wrote in reply to a letter from the plaintiff to the defendant as follows: "In reply to yours of the 20th. Mr. Walters is writing to you about the property and conditions you named . . . . about the house being damp we have been here three years and have seen it no worse than when you saw it and it is the most dry and cosy house I have ever lived in, the roof is in quite habitable repair." I have no doubt that these statements were relied on by the plaintiff and were very seriously inaccurate and misleading, and would certainly have entitled the plaintiff to resist specific performance of her contract, had she learned the true facts prior to the completion of the contract; though whether they would have enabled her to obtain rescission and restitutio in integrum after the conveyance is more doubtful. In fact, however, she has not sought either of these remedies while they might have been available, but limited herself to complaints and to requests that the defendant Bond should make the representations good to some extent. And, this being so, I do not think that the plaintiff can now rely on these misrepresentations in aid of her present claim; and I mention the matter as possibly explaining to some extent the subsequent conduct of the parties. [His Lordship then stated the facts and continued:] It is of some importance to observe that, throughout the whole period from the date of the mortgage to the commencement of the action, no complaint whatever was made to the plaintiff by the defendant or his solicitor as to the property being out of repair, or as to his security being in any way endangered.

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And in the particulars of sale prepared for the intended auction by the same firm of auctioneers, who afterwards prepared a report to which I will refer later, the property is described as a "Charming old fashioned freehold property," while the residence itself is called "a picturesque red-brick building of the Georgian period." I have come somewhat reluctantly to the conclusion, notwithstanding what the defendant said in the box, that the case as to disrepair was raised by way of afterthought and by way of defence to the plaintiff's action; and that the real reason for the defendant's attempt to enforce his mortgage was not any apprehension on this score, or as to the possible insufficiency of his security, but the natural desire to secure that higher rate of interest on his money which would result from its being available for investment at large. But while the result of this view was to cause me to discount considerably the evidence of the defendant, and to a less extent that of his sister-in-law, as to the comparative condition of the property generally at the present time, and at the date of the sale to the plaintiff and the mortgage by her, it does not by any means follow that I must reject the defendant's contention. A defence may be justified, though raised only by way of afterthought. That it is an afterthought is merely a reason for examining it with some extra care and precaution.

The particulars of the disrepair on which the defendant relies are those comprised in a report which was made to him quite recently—namely, on January 19, 1922—by a firm of house agents at Bournemouth and was prepared for them by an employee different from the employee who had prepared the particulars of sale. The latter employee's object, as he stated in the box, was to find the favourable features of the property; the former had to discern the defects. In doing so he by no means limited himself to pointing out those defects which consisted of want of repair to the structure of the property or were of a serious character. On the contrary he called attention to every defect, large or small structural or decorative, which an exacting tenant might require to be made good as a condition of taking a fresh

tenancy of the property. And accordingly I disregard the elaborate details of the report and confine myself, as indeed counsel on both sides did, to its main statements and conclusions. These were accepted both by the plaintiff and by a builder Mr. Hiscock who gave evidence on her behalf and are as follows :—

" Generally speaking the premises are in a very poor state of repair.

" The roofs are not watertight and the rafters are sagging and giving way, one of the principal beams is coming away from the wall itself, underneath the beam is being forced outward and appears to be held up by the W.C. wall which is acting as a buttress. It appears likely that an entirely new roof will be required.

" The cornice on the top of the wall of the front elevation is also giving way and the pointing on the exterior walls requires renewing especially on the chimney breasts and stacks.

" Damp is apparent on the interior walls in many places owing to the walls being solid, although 14" in thickness. No damp course is apparent, and, if this course is missing, the damp is rising up the walls from the ground and also soaking through above ground.

" The roof of the upstairs W.C. consists of a large slate slab which has split in two and lets in the water, and as a result the floor appears to have rotted, as we were told that it was unsafe.

" The ceiling of Bedroom No. 5 has cracked badly. The loft above was once used as an apple store and the weight may have sagged the joists which are of rather small gauge.

" The W.C. apparatus is not connected up, having been disconnected, we are informed, owing to the well from which the house is supplied with water being reported as being close to the cesspool. We consider the water supply should be obtained from the Company's mains which run in the road in front of the house, and the W.C. could then be connected up with the cesspool.

" The house is not supplied with either electric light or gas.

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"Many of the ceilings are badly damaged and require plastering."

Then after an itemised list of repairs required the report concluded :—

"The writer cannot speak definitely as to the condition of the premises at the time of the commencement of the mortgage, but the condition of the premises suggests that little or no attempt has been made to keep them in tenantable order. However, the main part of the repairs required is structural work due to structural decay or defects and until this is done it is hardly worth while attempting the purely decorative work.

"From the appearance of the premises and the bad state of the rotten woodwork, we consider that very little has been done to the premises in the way of repairs for at least ten years, and quite possibly longer, excepting the dairy and the big cow shed."

It is now necessary to consider what was the state of the property at the time of the conveyance to the plaintiff and the mortgage by her in the year 1918. It appears that it had been bought by the defendant in 1914 and occupied by him till the sale to the plaintiff. And previously to that it had been occupied for some years by the builder John Hiscock who was the principal witness for the plaintiff, and whose evidence, speaking generally, I accept in preference to that of the defendant and of his sister-in-law Mrs. Arnold. In my judgment the house was both structurally and decoratively no better then than it is now, at any rate if allowance is made for the natural operation of time on a building of this character. As regards two of the three main defects on which stress is laid in the report of last January—namely, the defective sanitation and the dampness due to the absence of a damp course the position is necessarily unchanged. And as regards the third main defect, the roof, it seems that the roof was too old to get on for repair prior to the plaintiff's purchase ; and such deterioration as has taken place is in the nature of the gradual development of a fault in the original construction—namely, the pushing out by one of the

principal beams of one of the walls of the house at one point. Further, as regards minor items of repair, the defendant was not able to show that during his occupancy he spent more than 15*l.* on repairs, of which much the greater part was spent at the beginning and on decoration; while, on the other hand, the plaintiff during her time has spent over 40*l.* on repairs, including the rebuilding of walls outside her house, the repair and planting of fences, repair to ceilings, and various decorative repairs which were however wholly or in great part spoiled by the damp. In my judgment, if regard is to be had to the age and condition of the property at the date of the mortgage, and if all question of improvement of the main structural features of the property is excluded, the plaintiff has acted quite reasonably with regard to the maintenance and repair of the property and the preservation of its capital value.

This view of the facts was not very seriously contested by Mr. Vaisey, for the defendant. His argument rested mainly, if not exclusively, on the language of the Act, as interpreted by the meaning which has been placed by the Courts on somewhat similar language in bargains between individuals. He argued that when buildings were out of repair, an obligation to keep them in repair involved an obligation to put them in repair; and that in this case the building could not be put or kept in proper repair without the addition of a damp course and the provision of a new roof, though he did not insist on a reconstruction of the drainage system, however necessary that might be to make the house really tenantable. He submitted that the expense of the suggested works, amounting to some 400*l.* or 500*l.*, or the fact that they involved not mere repair but new construction, was immaterial, having regard to the plain language of the Act. And he cited in support of his argument such well-known cases as those of *Payne* v. *Haine* (1) and *Proudfoot* v. *Hart*. (2)

I feel the force of much of this argument, and yet, on the whole, am unable to accept it. Even assuming that the construction contended for would prevail in the case of a

(1) 16 M. & W. 541. (2) 25 Q. B. D. 42.

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private bargain between individuals in a particular case—and I may say that this would be pushing the doctrine of the cases cited to its furthest limits and to an extent almost revolting to common sense—it by no means follows that the same interpretations should be placed on the language of a public general statute. In such cases it is permissible, and may often be necessary, to consider the general scope of the statute in question and the mischief sought to be remedied, and to give to any general, doubtful or ill-defined terms such a meaning as will best accord with the main object of the measure: see such cases as *Hawkins* v. *Gathercole*. (1)

And to no class of statutes is the principle more obviously applicable than to emergency legislation such as this, passed in exceptional circumstances for temporary purposes, and to protect large classes of individuals against the strict enforcement of contracts that might prove ruinous to them from no fault of their own. It would be lamentable if the protection obviously intended to be given generally to the mortgagors of small properties were to be cut down and stultified by an unduly strict construction of the provisoes to the section.

Now the provisoes to this section are obviously directed to securing this and apparently no more than this—namely, that, during the suspension of his right to recover his principal, the mortgagee's rights shall not be otherwise prejudiced, and the general position shall be kept in status quo. And the generality of the phrase "keep in a proper state of repair," especially when contrasted with the much more specific language of s. 2, sub-s. 5—namely, "good and tenantable repair"—would appear to have been used in view of the difference between the relations of landlord and tenant and those of mortgagee and mortgagor. In the former case ownership is involved, and any defect, however trifling, in the structure is a direct loss to the landlord; in the latter case the question is only one of loan, and there is no loss to the mortgagee, unless and until the margin of his security is appreciably affected—a result which in the present case has

(1) (1855) 6 D. M. & G. 1.

not even been suggested by the defendant's evidence; and accordingly the standard of repair to be reasonably required —or which is "proper"—for the protection of a mortgagee is obviously more elastic than that appropriate in the case of a landlord.

Bearing this distinction in mind and having regard to the general scope of the provisoes to s. 7, I have come to the conclusion that the "proper state of repair" in which a mortgagor has to keep his property, in order to obtain the benefit of the section, must be measured by the general condition of the property at the date of the mortgage, and is not to be extended beyond the preservation of the property in a state corresponding with its condition at that date. The phrase cannot in my judgment be read as equivalent to keeping in "good" or in "tenantable" repair, nor in a sense to compel a rebuilding of the whole or of an integral part of the whole structure, such as is involved in the provision of a new roof or the virtual reconstruction of the walls by the introduction of a damp course throughout their length. In my judgment the language of the proviso as to repair is satisfied, if the property is repaired with reference to its general condition at the date of the contract between the mortgagor and the mortgagee, and in relation to the nature of the bargain between them—that is, so as to keep the property not substantially deteriorated and as good a security for the mortgage money as it was. I cannot think that in cases where "good repair" or "tenantable repair" in a private contract would involve complete reconstruction, "proper repair" in this section has an equally stringent meaning, or that the mortgagor fails to obtain any relief under the section, unless he proceeds far beyond preserving the status quo and launches out into providing an entirely new structure. And yet in many cases this would be the inevitable result of the argument for the defendant.

In the result I find that the plaintiff in this case has not fallen short of the standard of repair as between mortgagor and mortgagee which is set up by s. 7, and accordingly that the defendant has failed in his defence on this ground also.

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The plaintiff is therefore entitled to an injunction as asked during the continuance of the Act of 1920 and so long as she continues to comply with the provisoes of s. 7.

Solicitors: *Henry Anderson; Peacock & Goddard, for F. A. Johns, Bournemouth.*

H. C. G.

RUSSELL J. 1922 *Feb.* 24.

In re LUCAS.

RHYS *v.* ATTORNEY-GENERAL.

Considered. In re COULTHURST, DECD. [1951] 1 Ch. 669

[1921. L. 3222.]

Charity—Gift to "oldest respectable inhabitants" of Five Shillings per Week Each—Age—Poverty—Good charitable Bequest.

A testator gave the income to be derived from all his securities to his niece, A. E. Y., for her life, and after her decease, to "the oldest respectable inhabitants in Gunville to the amount of five shillings per week each":—

Held, that the amount of the gift implied poverty, and, coupled with the use of the word "oldest," implying age, was sufficient to render the gift a good charitable bequest.

In re Dudgeon (1896) 74 L. T. 613 followed.

ADJOURNED SUMMONS.

By his will, dated September 17, 1915, the testator directed that after the decease of his wife, who predeceased him, the income derived from all his securities should go to his niece, the defendant, Agnes Eliza Yeatman, during her life, and from and after her decease, he directed that seven trustees should be appointed, in the first place, by the trustees of his will, as he desired that all the income derived from the investments should be given to "the oldest respectable inhabitants in Gunville to the amount of five shillings per week each," and he also requested that a tablet should be prepared at his decease, and placed in or on the outside of the church at Gunville, stating that at the decease of his niece, the income derived from all his investments would be given to the oldest

respectable inhabitants in Gunville to be selected by his trustees.

The testator died on October 12, 1920, leaving A. E. Yeatman his sole next of kin and heiress at law.

This summons was taken out by the trustees of the will, and it asked whether the gift in favour of the oldest respectable inhabitants in Gunville was a good charitable bequest, or was wholly or partially void.

G. D. Johnston for the plaintiffs.

Dighton Pollock for the Attorney-General. This is a good charitable bequest within the meaning of the Statute of Elizabeth (43 Eliz. c. 4). The word "oldest" used as it is here is on the same footing as the word "poorest." The amount given, five shillings a week, obviously indicates that it was the intention of the testator to benefit people in indigent circumstances. "Oldest" means the old or very old: *Attorney-General* v. *Duke of Northumberland.* (1) The implication of age is sufficient to enable the Court to hold that the gift is a good charitable bequest: *In re Wall* (2); *Thompson* v. *Corby* (3); *In re Gosling* (4); *Attorney-General* v. *Haberdashers' Co.* (5) If, however, the implication of age is not sufficient to render this gift a good charitable bequest, then the ingredient of poverty, introduced by the amount of the gift, will suffice. In *In re Dudgeon* (6) the gift was 10*l.* a year to respectable single women of good character above the age of 60 years, and it was held to be a good charitable bequest. That is very similar to the gift in the present case, where there is age with a limit of relief. There is enough, on those authorities, in this gift for the Court to imply charity.

W. H. Horsley for the next of kin and heiress at law. What the testator probably meant was that the recipients of this gift were to be the oldest respectable residents of Gunville. That might easily include persons who were not in need of

(1) (1877) 7 Ch. D. 745.
(2) (1889) 42 Ch. D. 510.
(3) (1860) 27 Beav. 649.
(4) (1900) 48 W. R. 300.
(5) (1834) 1 My. & K. 420.
(6) 74 L. T. 613.

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charity. If, on the other hand, he meant the oldest in age, then there would be a great inducement to old people of other parishes to come into the parish of Gunville, which might defeat the testator's intentions.

The preamble to the statute of Elizabeth contains a definition of charity which comprises, amongst other things, gifts for the relief of aged, impotent and poor peoples, but the definition in the preamble has been held not to be exclusive, and in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1), Lord Macnaghten says that charity as defined by law comprises four principal divisions: (1.) trusts for the relief of poverty; (2.) trusts for the advancement of education; (3.) trusts for the advancement of religion; and (4.) trusts for other purposes beneficial to the community. To bring this case within that definition, the Court must find a trust for the relief of poverty. There is no such trust here. In *In re Wall* (2) there was the word "deserving," which does import poverty. A gift to aged people is not a charity; another ingredient must be brought in, poverty. In *In re Dudgeon* (3) the gift is for the benefit of people of a poor class, and imports poverty. Also in that case the distribution of the gift was to be in the hands of the rector and churchwardens, and that in itself imported charity. There is nothing here to import poverty, except the smallness of the amount of the gift.

RUSSELL J. In this case the point I have to determine is whether a particular gift contained in the will of Edwin Lucas is or is not a good charitable gift. The gift is in these terms. [His Lordship read the provisions of the will, and continued:] This is a gift of income in perpetuity in favour of the persons above mentioned, and, of course, if the bequest is not a good charitable bequest it would fail, and, as the tenant for life under the will is sole next of kin and sole heiress at law, she would be entitled to the whole of the testator's estate. I confess that when the will was first read to me it

(1) [1891] A. C. 531, 583. (2) 42 Ch. D. 510.
(3) 74 L. T. 613.

did not strike me as being capable of being construed as a good charitable bequest, because the beneficiaries are to be "the oldest respectable inhabitants," words which, by themselves, do not in any way connote poverty. But Mr. Dighton Pollock has referred me to various authorities, and he puts his case in this way: "In the first instance," he says, "I can claim it as a good charitable bequest, it being for the benefit of aged persons and coming within the statute of Elizabeth, or alternatively I can read out of this gift in the will the element of poverty, in which case the gift would then equally be a good charitable gift." Speaking for myself, I am not satisfied that the requirement of old age would of itself be sufficient to constitute the gift a good charitable bequest, although there are several dicta to that effect in the books. I can find no case, and none has been cited to me, where the decision has been based upon age and nothing but age. In *Thompson* v. *Corby* (1) the gift was this: "And I give the interest of the remaining 600*l.* of the aforesaid 1600*l.* to be divided equally, twice in the year, between twenty aged widows and spinsters of the parish of Peterborough." In giving judgment the Master of the Rolls says this (2): "If the matter had depended on the statute alone, I should have thought that the word 'aged' would have been sufficient to create a good charitable bequest; but the case of *Attorney-General* v. *Comber* (3) determines that a bequest to the widows and orphans of a parish necessarily implies that it is for such as are suffering from destitution or privation." There we have a statement by the Master of the Rolls that in his view the word "aged" would have been sufficient, but he does not base his decision upon that view; he bases his decision upon the authority of a case which says that such a bequest implies destitution or privation.

In *In re Wall* (4) we have a decision of Kay J. very much on the same lines. The gift there was: "I desire the interest of this 2500*l.* absolutely and for ever to be

(1) 27 Beav. 649.
(2) 27 Beav. 650.
(3) (1824) 2 S. & S. 93.
(4) 42 Ch. D. 510.

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divided into annuities of 10*l.* each, and to be paid half-yearly to an equal number of men and women not under fifty years of age, Unitarians, and who attend Lewin's Mead Unitarian Chapel or chapels in Bristol; a tablet to be placed in Lewin's Mead Chapel to give the information of gift, otherwise how should the deserving know of it." Kay J. commences his judgment by saying (1): "I confess I think that this is a matter of some difficulty, but looking at the words of the statute, which expressly mentions 'aged' people, I do not see how I can avoid the conclusion that this is a charitable gift." Pausing there, that is an indication of the view of the learned judge that "aged" by itself would probably be enough, but again it will be observed that he does not base his judgment upon that. He goes on (2): "I find in the statute of Elizabeth that one of the classes of persons who are objects of charitable gifts are 'aged persons.' Without straining language, I cannot say that where there is a gift to persons not under fifty years of age those persons are not 'aged' within the statute. I think they are. I think there is enough in this will to indicate that the objects of the gift are aged persons, members of one or other of these congregations; and in dealing with such a trust I conceive the duty of the trustees would be to give the benefit of it to the deserving of the class, and although 'deserving' would not of itself indicate that they were to be poor, yet when I couple all these facts together, that they are to be not under fifty years of age, deserving, members of a congregation of Unitarians, and that the annuities are only 10*l.* each, I cannot help thinking that the true construction of these words must be that poor members of the congregation who have passed that age, and are less able to provide for themselves than they would be if they were younger, are intended to be benefited. I hold, therefore, that the gift is charitable." Again, it will be observed that the learned judge really bases his decision upon the element of poverty.

Byrne J. had to consider a gift in favour of "old and

(1) 42 Ch. D. 511. (2) 42 Ch. D. 512.

worn-out clerks" in *In re Gosling.* (1) The gift was to form a fund for the purpose of pensioning off old and worn-out clerks of a particular firm, and it was held to be a good charitable bequest. Byrne J., in his judgment, uses this language (2): "Amongst other objects enumerated in the preamble to the statute of Elizabeth, are the 'aged' and 'impotent.' Poor persons are especially mentioned there, and also the supportation, aid, and help of young tradesmen and handicraftsmen and persons decayed. There is some authority for saying that a gift to the aged of a parish generally without expressing that they are also the poor is not good: see *Attorney-General* v. *Haberdashers' Co.* (3) But in *Attorney-General* v. *Comber* (4) it was held that a gift to widows and orphans of a parish was a good charitable gift. In *Thompson* v. *Corby* (5), Lord Romilly followed the case of *Attorney-General* v. *Comber* (4), and also expressed a clear opinion that in the case of the gift of the interest of 600*l.* to be divided between twenty aged widows and spinsters of the parish of Peterborough, the word aged would have been sufficient to create a good charitable bequest." Then he refers to the decision of Kay J. in *In re Wall* (6) to which I have also referred. Byrne J. then continues: "The aged are, as I have said, expressly mentioned in the statute, as also are the impotent. I think 'worn-out' and 'aged' clerks come also within the description 'impotent.' I think, moreover, having regard to the phrase 'pensioning off' and to the frame of the gift, that poor clerks of the firm and those unable to properly provide for themselves and their families are intended to be benefited." So that the learned judge there, again, brings in the element of poverty and relies upon it.

The last case referred to was *In re Dudgeon* (7), which in many respects is like the present case. The gift there was: "Upon trust to pay the same to the rector and

(1) 48 W. R. 300.
(2) 48 W. R. 301.
(3) 1 My. & K. 420.
(4) 2 S. & S. 93.
(5) 27 Beav. 649.
(6) 42 Ch. D. 510.
(7) 74 L. T. 613.

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churchwardens for the time being of the parish of St. Nicholas in the said town of Nottingham, who shall invest the same and distribute the income to be derived therefrom in their absolute and unfettered discretion amongst respectable single women of good character above the age of sixty years, to be paid by monthly instalments, but so that no recipient shall receive more than 10*l.* per annum." Stirling J. held that this was a good charitable gift. He said: "I quite agree with the proposition of law stated on behalf of the next-of-kin that, if objects as defined by the testator go beyond those defined by or by analogy to the Statute of Charitable Uses, the gift is bad. But it appears to me that the cases cited on behalf of the charity do show this, that it is not absolutely necessary to find poverty expressed in so many words, but that the Court will look at the whole gift, and, if it comes to the conclusion that the relief of poverty was meant, will give effect to it although the word 'poverty' is not to be found in it. I do not see how otherwise the decision of Sir John Leach in *Attorney-General* v. *Comber* (1) and of Lord Romilly in *Thompson* v. *Corby* (2) can be explained. Those cases come very closely to the present one. Here there is a gift to the rector and churchwardens for the time being of the parish of St. Nicholas, Nottingham, being persons much drawn into contact with poverty, to invest and distribute the income among respectable single women of good character above the age of sixty years in such manner that the total in each case shall not exceed four shillings a week. I cannot imagine that any sane testator had anything in his mind in such a case if it were not the relief of distress. I come to the same conclusion as was arrived at in the two cases to which I have referred, that it was meant for the benefit of the poor. It is therefore a good charitable gift." Now, upon these authorities, I do not feel myself justified in holding that it has been decided that age and age alone would constitute a gift a good charitable bequest. But I find this: that though the Court takes the view that upon the construction of the gift

(1) 2 S. & S. 93. (2) 27 Beav. 649.

the object of it was to benefit persons in necessitous circumstances, you need not necessarily look for those words expressly in the will. But, if you can construe the gift in such a way as to hold that the testator meant that the persons to be benefited should be in necessitous circumstances, then that introduces the ingredient of poverty and will turn a gift which might otherwise be not a charitable gift into a good charitable gift.

Now, turning to this will, we find the words "the oldest respectable inhabitants," and it was suggested that that means not old as regards the number of years the person has spent upon this planet, but only old in regard to the number of years he or she has spent in Gunville, that is to say, the oldest inhabitant. I think the testator here, when he says "oldest" meant very old, just as in the case of *Attorney-General* v. *Duke of Northumberland* (1), where the testator said "poor" he meant very poor. Here the testator directs that these old people shall receive five shillings a week and no more. That, to my mind, indicates quite clearly that the class of persons who were to be benefited were persons to whom the receipt of that sum would be of importance and a benefit. In my view, he had in his mind the benefiting of old people who were in straitened circumstances, and to whom five shillings a week would bring comfort and relief. To my mind, the gift here is singularly like the gift in *In re Dudgeon* (2), where Stirling J. was able to read into the will the element of poverty, owing to the smallness of the sum contemplated in that case. There it was four shillings, and in this case the amount is five shillings.

Upon these authorities I am prepared to hold, and I do hold, that this gift is a good charitable gift.

Solicitors: *E. M. Tringham, for Barrett & Thomson, Slough; The Treasury Solicitor; Peacock & Goddard, for Luff & Raymond, Wimborne.*

(1) 7 Ch. D. 745. (2) 74 L. T. 613.

P. J. B.

RUSSELL J.

1922

Feb. 10, 17; *March* 9.

In re VULCAAN COAL COMPANY.

HARRISON *v.* HARBOTTLE.

[1919. V. 133.]

War—Emergency Legislation—Enemy Company registered in Holland—Business in England wound up by Board of Trade—Appointment of Controller—Manager appointed by Company for a Period of Years—Breach of Agreement—Claim for Salary—Not a Debt of the English Business—Position of Controller—Trading with the Enemy Amendment Act, 1916 (5 *&* 6 *Geo.* 5, *c.* 105), *s.* 1, *sub-s.* 1.

A controller appointed by the Board of Trade under s. 1, sub-s. 1, of the Trading with the Enemy Amendment Act, 1916, to wind up the English business of an enemy company or firm, does not represent the company or firm. His duties are to get in the assets and discharge the liabilities of the business.

By an agreement, dated March 28, 1913, J. P. H. was engaged as manager of the Newcastle branch of a German company registered in Holland until June 30, 1918, at a salary of not less than 1000*l.* per annum. On August 14, 1916, the Board of Trade made an order to wind up the business and appointed a controller under s. 1, sub-s. 1, of the Trading with the Enemy Amendment Act, 1916. On August 31, 1916, the controller dispensed with the services of J. P. H. At that date J. P. H. had in his possession certain moneys of the business, which he claimed to retain, as against the controller, to satisfy his claim for damages for breach by the company of the agreement:—

Held, that the claim was against the company, and not against the business, and that, therefore, J. P. H. was not entitled to retain the moneys as against the controller.

ADJOURNED SUMMONS.

The Vulcaan Coal Company was a company formed under Dutch law, with its head office at Rotterdam, and with branches in England and other countries. All the directors and shareholders were German. By an agreement, dated March 28, 1913, the company engaged J. P. Harbottle as manager of its branch office at Newcastle, subject to the orders of the board of directors, until June 30, 1918, at a remuneration guaranteed to amount to not less than 1000*l.* per annum. The company's obligations under the agreement were guaranteed by a concern called the Gewerkschaft Deutscher Kaiser. Harbottle was still employed under that agreement when war broke out. He at once took steps to pay off the British trade creditors of the company, retaining, however, in his

possession, a sum of 1612*l.* 7*s.* belonging to the company, which he deposited at a bank in Newcastle in his own name on October 9, 1914, with the object of providing security for any claim that he might have against the company for damages for breach by the company of the agreement. On August 14, 1916, an order was made by the Board of Trade under s. 1, sub-s. 1, of the Trading with the Enemy Amendment Act, 1916, requiring that the business carried on in the United Kingdom by the Vulcaan company should be wound up, and appointing the applicant, T. Harrison, as controller to control and supervise the carrying out of the order, and to conduct the winding up of the business, with the powers therein mentioned. At that date the British creditors had been paid off to the extent of about 81½ per cent. of their claims. The controller retained the services of Harbottle until August 31, 1916, up to which date he was paid at the rate of 1000*l.* per annum. On his services being dispensed with, Harbottle claimed to retain as against the controller the sum of 1612*l.* 7*s.* on deposit in his name at the bank, alleging that he was entitled to retain that sum as against his claim for damages for breach by the company of the agreement. The amount of his claim he fixed at 1833*l.*, being at the rate of 1000*l.* per annum from August 31, 1916, to June 30, 1918. By arrangement, made without prejudice to Harbottle's claim, it was agreed that the money on deposit should be invested in the joint names of the controller and Harbottle, and, accordingly, on January 17, 1917, 1700*l.* 5 per cent. War Stock was purchased. The present summons was issued by the controller in March, 1919, and it asked for directions as to how he should deal with Harbottle's claim. Harbottle died in January, 1920, and his executors were made respondents to the summons. The funds now in dispute consisted of (*a*) 1700*l.* 5 per cent. War Stock; (*b*) dividends thereon; and (*c*) a small sum standing to the credit of the deposit account at the bank.

F. K. Archer for the controller.

Clauson K.C. and *Farwell* for the respondents. The

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respondents have a claim against the company, and they are entitled to the money retained by Harbottle as a set-off against that claim. The controller could not recover the money retained, except on behalf of the company. Supposing that at the time the controller was appointed, the company had money at a bank, and the bank had a cross-claim against the company, the controller could not claim that the company should hand over the money at the bank without considering the cross-claim. The asset which the controller can claim is not the money which Harbottle retained, but such right as the company had in 1916. Under s. 1, sub-s. 2, of the Trading with the Enemy Amendment Act, 1916, the controller is given the powers exercisable by a liquidator in the voluntary winding up of a company. If he has no higher right than a liquidator, then there is no answer to this claim. There is nothing in the Act which gives him a higher right, and the Board of Trade orders cannot give him any higher rights. The appointment of a liquidator acts as a notice of dismissal of a company's servants: *Reid* v. *Explosives Co.* (1); *MacDowall's Case.* (2) The effect, therefore, of the appointment of the controller, was to terminate the engagement of Harbottle. There was nothing in the Act of 1916 to give the controller any higher right than the company had, or to get in anything which the company could not have got in if it had been an English company.

Gavin Simonds for the Board of Trade. This claim cannot be supported by any of the decisions on the Act of 1916. The winding-up order in no way terminated Harbottle's engagement: *In re Anglo-Austrian Bank* (3), where Younger J. held that the contract was between the German company and the manager, and that only German law could determine the contract. If the claim were against the company, that did not give Harbottle a claim against the assets of the company, which at the moment the claim arose passed into the hands of another. The rule as to set-off is laid down in *Government of Newfoundland* v. *Newfoundland Ry. Co.* (4)

(1) (1887) 19 Q. B. D. 264.
(2) (1886) 32 Ch. D. 366.
(3) [1920] 1 Ch. 69.
(4) (1888) 13 App. Cas. 199.

The Act of 1916 creates an artificial entity. Under that Act the duty of the controller is to collect the assets of the business, and to pay debts which under the Act he has to discharge. His position and duties are different to those of a liquidator. The position of a controller appointed under the Act is very fully dealt with in *In re Kastner & Co.* (1) It is clear, on the cases, that the respondents have no claim against the controller. Their claim, if any, is against the company, and the controller does not represent the company. His duties are to get in the assets and discharge the liabilities of the business.

Cur. adv. vult.

March 9. RUSSELL J. [after stating the facts read the following written judgment:] The present summons was issued in March, 1919, by the controller. Mr. Harbottle died in January, 1920. The summons was duly amended, and the respondents are his executors. As is usual the Board of Trade has also been served.

The question for determination is whether the executors are entitled to have transferred to them the funds above referred to. This claim is opposed both by the controller and the Board of Trade.

Stated in its simplest form the real question is this: Was Mr. Harbottle entitled on August 14, 1916, to refuse to hand over to the controller the 1612*l.* 7*s.*, being assets of the business which he had deposited in the bank in his own name?

The claim of the executors is based upon the following propositions: (1.) That the effect of the order of August 14, 1916, was to repudiate the agreement; (2.) That had the company (there being no war) repudiated the agreement and sued Mr. Harbottle to recover the 1612*l.* 7*s.*, Mr. Harbottle could have set up a cross-claim for damages and judgment would have been entered only for the balance after setting off the cross-claims; (3.) That the asset of the business which the controller is entitled to recover is not the 1612*l.* 7*s.*, but the right of the company to recover it, that is to say, subject

(1) [1917] 1 Ch. 390.

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to the cross-claim; in other words that the controller has no greater right than the company would have had. The controller and the Board of Trade did not before me dispute the second proposition, but they assert: (1.) That the order of August 14, 1916, did not terminate the agreement and accordingly no claim for damages against the company exists at all, and (2.), even if such claim does exist, the controller comes in by title paramount to the owner of the business and is unaffected by any alleged right of set-off against such owner.

In regard to the first point they rely upon a passage which occurs in the judgment of Younger J. in the case of *In re Anglo-Austrian Bank.* (1) In that case the manager of the London branch of an enemy bank (which business had been ordered to be wound up) was claiming against the assets of the London branch a sum for salary or for damages for wrongful termination of his service agreement on the footing of the amount claimed being a debt of the business. In rejecting the claim Younger J. used this language: "But I can myself see no ground for holding that either a claim for salary under a contract made with the head office and in respect of a period when no services were rendered to the agency or for damages for the supposed determination of a contract which, so far as I can see, only Berlin could determine, can be said to be made in respect of such a debt."

Those words undoubtedly suggest that the learned judge's view was that the contract had not been determined; but the matter had not been very fully argued before him, nor was that view necessary to the decision which he gave. It is true that the case of *Reid* v. *Explosives Co.* (2) had been cited to him in argument, curiously enough as an authority against the view that a Board of Trade order winding up a business under the Trading with the Enemy Amendment Act, 1916, determined a contract of service. I should have thought myself that that decision if relevant rather pointed in the other direction. But however this may be I do not propose

(1) [1920] 1 Ch. 69, 76. (2) 19 Q. B. D. 264.

to decide this question, for I am prepared to deal with this case upon the assumption (in the favour of the executors) that the order of August 14, 1916, did operate to determine the agreement of March 28, 1913.

Upon that footing, the point remains could Mr. Harbottle set up as against the controller the right to set-off which he claimed to have as against the company?

In my opinion he could not.

The controller does not for this purpose represent or stand in the shoes of the company. He is an official appointed to get in, not the assets of the company, but the assets of a particular business of the company, and his duty is to discharge, not the debts of the company, but the debts of that business. This treatment of the assets and debts of a business apart from, and otherwise than as, assets and debts of the owner of the business is a novel statutory conception. The statute isolates the business to which the order relates and its assets and the claims upon those assets from other assets of the owner of the business and other claims against him or them; and it provides for the distribution of the moneys resulting from the realization of the isolated assets by discharging the isolated debts and distributing the balance under the direction of the Board of Trade.

The assets to be got in are the assets of the business viewed as such, and not viewed as the assets of the owner of the business; and in ascertaining what a particular asset is, no regard should in my opinion be paid to any claim assertable against the owner of the business by a person who is not a creditor of the business.

Although the Act refers to powers exercisable by a liquidator in a voluntary winding up of a company, the position of a controller under the Act is quite different from that of a liquidator. The controller does not come in under the title of, or represent, the person, firm or company whose business in the United Kingdom is to be wound up; he comes in by title paramount to that of the owner of the business, or of those claiming through or against such owner. The peculiar and overriding position filled by a controller is well

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illustrated by such cases as *In re Kastner & Co.* (1); *Continho Caro & Co.* v. *Vermont & Co.* (2); and *In re Dieckmann.* (3)

To allow the fund here in question to be diminished or wiped out by reason of an alleged claim against the company would in effect be to treat the fund not as an asset of the particular business, but as an asset of the owner of the business, and to treat the controller as deriving his title to that asset through such owner. This would, in my opinion, be contrary to the provisions and scheme of the Act.

To admit Mr. Harbottle's claim would be to allow him to set off against this asset of the business or against the controller a claim which he cannot assert against the business or the assets of the business. He could only assert it against the company, which for this purpose is a third party.

A different result might indeed produce grave injustice, because for all that the controller is in a position to know the company might have a perfectly good answer to Mr. Harbottle's claim on various grounds. It is still, of course, open to Mr. Harbottle's executors to take such steps as they may be advised in establishing their claim against the company in Holland, or against the guarantors, the Gewerkschaft Deutscher Kaiser.

The result is that on the summons, I direct the controller to reject the claim for damages and the claim for transfer to the executors of the funds in question.

The costs of all parties of this application will be paid by the controller out of funds in his hands in the winding up.

Solicitors: *Field, Roscoe & Co.; Doyle, Devonshire & Co., for Walter Molineux, Newcastle-on-Tyne; Solicitor to the Board of Trade.*

(1) [1917] 1 Ch. 390. (2) [1917] 2 K. B. 587.
(3) [1918] 1 Ch. 331.

P. J. B.

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Jan. 24, 25, 26; *Feb.* 22.

[0084 of 1919.]

Insurance—Policy of Reinsurance—Event dependent on Date of Declaration of Peace—Wager Policy—Marine Policy—P.p.i. Policy—Detachable p.p.i. Slip—Short and long Slips—Winding Up—Proof by Policy Holder—Proof for Debt of Honour—Duty of Liquidator (voluntary) to admit—Life Assurance Act, 1774 (14 *Geo.* 3, *c.* 48)—*Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *s.* 4—*Gaming Act*, 1845 (8 *& 9 Vict. c.* 109).

In the winding up of a reinsurance company claims were made under, First: a class of policy which was issued by the company by way of reinsurance on a printed form adapted to marine insurance, to insure the payment of a sum of money in respect of a total loss "in the event of peace not being declared between Great Britain and Germany on or before 31 March, 1918." To that policy was attached a detachable p.p.i. slip, which expressly stipulated as follows: "This slip is no part of the policy, and is not to be attached thereto, but is to be considered as binding in honour on the underwriters; the assured however having permission to remove it from the policy should they so desire. In the event of claim it is hereby agreed that this policy shall be deemed sufficient proof of interest. Full interest admitted." Secondly: a class of marine policy to reinsure a ship therein named against marine risks, such policy having attached thereto a p.p.i. slip similar in all respects to that which was attached to the peace policies, which slip in some cases remained attached and in others had been detached at the date of the claim thereunder.

Upon an application by the company to have it determined by the Court, whether claims under either of those classes of policy ought to be admitted, *Held*: first, as to the peace policies: (*a*) that, as the losses insured against were not incident to any marine adventure, those policies did not come within the definition of a contract of marine insurance in s. 1 of the Marine Insurance Act, 1906; (*b*) that although they were policies of insurance within the meaning of the Life Assurance ("Gambling") Act, 1774, and were not mere wagers, yet, having regard to the description of the subject-matter of the insurance, the existence of the p.p.i. and f.i.a. clauses and the absence of proof of an insurable interest in the original assured, notwithstanding payment by the reassured under the original policy, the policies were by way of gaming and wagering and illegal and void under the above-mentioned Act of 1774; (*c*) that the premiums paid thereunder were irrecoverable. And secondly, as to the marine policies: (*a*) that the p.p.i. slip, having been attached to the policies at the time of signing and issuing the same, formed part of those policies in spite of the stipulation to the contrary on the slip, and that, consequently, such policies were void by virtue of s. 4 of the Marine Insurance Act, 1906, whether the slip remained attached to or was detached from the policy at the date of the claim thereunder; (*b*) even

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assuming the voluntary liquidator occupied the position of an officer of the Court, he was not bound by any principle of equity or honourable dealing to admit claims under those policies which the Legislature had declared void; (*c*) that, as the "long slips" presented to the insurance company by the assured's broker as the closing instructions contained instructions for the insertion of a p.p.i. clause, in the absence of evidence of a mutual or even a unilateral mistake, those policies ought not to be rectified by striking out the p.p.i. clause on the ground that the "short slip" did not stipulate for a p.p.i. clause; (*d*) that the consideration for the payment of the premium having wholly failed, claims for premiums paid thereunder ought by virtue of s. 84 of the Marine Insurance Act, 1906, to be allowed by the liquidator.

And accordingly, the Court declared that none of the claims under either of the two classes of policy, except in respect of the premiums on the marine policies, ought to be admitted.

ADJOURNED SUMMONS.

The London County Commercial Reinsurance Office, Ld. (hereinafter called "the company"), was incorporated in 1910, with a subscribed capital of 76,260*l.*, of which 40,000*l.* was paid up.

On March 20, 1917, a petition was presented to wind up the company, and on October 2, 1917, a committee of creditors was appointed. A scheme of arrangement was subsequently approved by that committee and on February 21, 1919, received the sanction of the Court. In pursuance of one of the conditions of the scheme an extraordinary resolution was passed in February, 1919, to voluntarily wind up the company; and Mr. Lionel Maltby was duly appointed liquidator. In the course of his duties as such liquidator he had to investigate numerous claims on policies, which had been issued by the company subject to a condition known as "policy proof of interest" (p.p.i.). The total amount of the claims under these policies was 97,538*l.* Various forms of policy had been issued by the company, but it is sufficient for the purpose of this report to state the following classes of policy: (*a*) policies of reinsurance, on printed forms generally used for marine policies, issued in the name of G. Chatelain & Co., as brokers for three insurance companies, which in every case had paid upon the policies issued by them to the assured; the risk insured against being a total loss in the event of peace not being declared between Great

Britain (England) and Germany on or before March 31, 1918. To those policies was attached a perforated slip capable of being detached at the option of the assured. The slip had printed upon it the following words: "This slip is no part of the policy, and is not to be attached thereto, but is to be considered as binding in honour on the underwriters; the assured however having permission to remove it from the policy should they so desire." "In the event of claim it is hereby agreed that this policy shall be deemed sufficient proof of interest." "Full interest admitted."

Those policies (hereinafter called "the peace policies") were prepared from "long slips" which contained instructions for "p.p.i." and "f.i.a." policies.

(*b*) Policies of insurance and reinsurance in the names of Alrik Sunden-Cullberg of Stockholm to cover war risks on steamships therein named. These policies had attached to them perforated slips capable of being detached at the option of the assured, such slips having printed on them the same p.p.i. and f.i.a. conditions as those printed on the slips attached to the peace policies. But the slips on these policies had not been detached at the time claims were made thereunder. In respect of these policies neither long nor short slips had been used. They were effected with the company by A. H. Davies as broker for the firm of Sunden-Cullberg, Mr. Davies at that time also occupying the position of managing director of the company. As the evidence showed Mr. Davies exceeded his authority as broker in allowing the p.p.i. condition to be inserted in those policies.

(*c*) Policies of reinsurance effected in the names of Hamilton Smith & Co., on ships, with p.p.i. slips attached similar to those attached to the Sunden-Cullberg policies. In the case of these policies, the slips had been detached at the time claims were made thereunder. The short slips to these policies contained no stipulation for a p.p.i. clause, while the long slips did contain instructions for such a clause, and it was alleged that those instructions were unauthorized by the reassured. These were further policies similar to the policies under the foregoing heads (*a*), (*b*) and (*c*), described

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under heads (*d*), (*e*) and (*f*), the validity of which was questioned having regard to the conditions appearing therein respectively—namely, f.i.a. (i.e., "full interest admitted"), f.a.a. (i.e., "free of all average" without "benefit of salvage"), and v.o.p. (i.e., valued as in original policy).

The following evidence was furnished to the Court by a director of the firm of Hamilton Smith & Co., insurance brokers in the City of London, as to the customary practice in marine insurance or reinsurance business, where the underwriters are a limited company: The broker, who is the agent of the assured, writes on a short slip the necessary particulars of the insurance proposed. Those particulars are sufficient as a rule, especially in cases of reinsurance, to enable a policy to be drawn up. The broker then submits the short slip to the company's underwriter who, if he is prepared to accept the risk offered, enters on the slip the amount which he is willing to insure and signs the slip with his initials and generally dates the signature. In this way by one or by several underwriters the full amount is insured. The short slip, thus initialled, is, according to marine insurance practice, deemed to be a complete and final contract, and neither party can, except with the assent of the other, deviate from the terms so agreed upon without a breach of faith. When under the contract, thus concluded, the broker requires a policy, in the case of an insurance with Lloyds underwriters he prepares it himself and submits it to them for signature, but, in the case of an insurance with a company, he hands to the company closing instructions in a document sometimes known as the "long slip," and from those instructions the company prepares and signs the policy. The broker, as agent for the assured, makes out the long slip, without which the company could not prepare the policy, as the broker takes away and keeps the short slip after it has been initialled. The underwriter signs the short slip only, and it is by the terms of the short slip alone that he is bound. If there is any variation between the short slip and the long slip, the former and not the latter is the authoritative expression and evidence of the contract; and that is so, whether the

insurance is made with Lloyds underwriters or with a company. In the ordinary understanding of brokers and underwriters engaged in marine insurance the term p.p.i. in a policy does not necessarily indicate that the assured has no insurable interest or does not expect to acquire an insurable interest. That term is inserted because the insurable interest is such that a loss in respect of it, though real, would be difficult to prove or assess. By the addition of such a term to the contract the underwriters agree to release the assured, in the event of a claim, from the difficulty and expense of proving his interest. It has become usual to add a p.p.i. clause (when required) by means of a slip bearing the following form of words: "This slip is no part of the policy and is not to be attached thereto, but is to be considered as binding in honour on the underwriters: the assured however having permission to remove it from the policy should they so desire."

One of the grounds, but a minor ground, on which it was sought to uphold the claims under the peace policies was the following: it was alleged that, pending the submission of the scheme of arrangement to the meeting of creditors, the solicitors acting for the creditors received a letter dated December 30, 1918, from Messrs. Wansey, Stammers & Co., solicitors acting for a reinsurance company in Denmark (which, as guarantor in respect of policies issued by the company, was a party to the said scheme), in which that firm stated that they had their clients' authority to agree that, if the creditors of the company to the extent of 56,000*l.*, including amongst them "the peace policy" holders, would support the scheme and the same were passed by the requisite majority and received the sanction of the Court, their clients would not dispute bona fide claims on the part of "the peace policy" holders, provided that such claims did not exceed 5000*l.* And it was claimed that as those conditions had been complied with, the liquidator was bound to admit the claims made by such policy holders.

A summons was accordingly taken out by the liquidator to have it determined whether he ought to admit the claims

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made under the policies described under the foregoing heads, (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*), or any and which of them, and whether, in the event of any of those policies being held to be void and no claims maintainable thereunder he ought to admit a claim for premiums paid in respect of any such void policy.

Messrs. G. Chatelain & Co. were appointed to defend and represent all the holders of the peace policies; Alrik Sunden-Cullberg was appointed for that purpose in respect of policies under head (*b*) and Messrs. Hamilton Smith & Co. were appointed in respect of policies under heads (*c*), (*d*) and (*f*); and Bertie N. L. Whiteaway was appointed in respect of policies under head (*e*).

R. A. Wright K.C. and *Whinney* for the liquidator. The peace policies are wagering contracts and are illegal and void under the Life Assurance Act ("Gambling"), 1774 (1), and the premiums paid thereunder are irrecoverable. As to the marine policies, under the Marine Insurance Act, 1746 (19 Geo. 2, c. 37), they would have been illegal, but by the Marine Insurance Act, 1906, they are rendered null and void by s. 4 thereof. It is immaterial to consider the "short slip" if the "long slip" (which contains the final instructions by the broker, as agent of the assured, and constitutes the real contract) contains instructions for a p.p.i. policy. When the long slip has been accepted by the assurers it may only be rectified on the ground of common mistake.

The detachable slip attached to a policy is part of the contract, notwithstanding a stipulation between the parties to the contrary: *Cheshire & Co.* v. *Vaughan Bros. & Co.* (2) Such a stipulation is a culpable evasion of the prohibition

(1) The Life Assurance Act, 1774, enacts that "no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons, for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering: and that every assurance made, contrary to the true intent and meaning hereof, shall be null and void, to all intents and purposes whatsoever."

(2) [1920] 3 K. B. 240.

of the Legislature based on the ground of public policy, and if it forms part of the contract, it renders the policy void by virtue of s. 4 of the Marine Insurance Act, 1906. (1)

Stuart Bevan K.C. and *Le Quesne*, for G. Chatelain & Co., representing holders of the peace policies. The peace policies, although they are upon marine policy forms, are not marine policies. There are no marine losses mentioned in the policies, nor is there any marine adventure, and there is no mention of a ship. These policies, not being marine, do not come under the Marine Insurance Act, 1906. The p.p.i. conditions on the detachable slip form no part of the contract of reinsurance. But assuming they are to be taken as forming part of the contract: at common law, these p.p.i. policies, before the Marine Insurance Act, 1746 (19 Geo. 2, c. 37), were not void at all: see Arnould on Marine Insurance, 10th ed., s. 311, dealing with "wager policies" at p. 428. A wager policy—i.e., one in which the parties by express terms (as, e.g., by a p.p.i. clause) disclaim the making of a contract of indemnity, is a valid contract of insurance. Then under the Marine Insurance Act of 1746, a contract on a ship without proof of interest (p.p.i.) or by way of gaming or wagering was null and void and was (being a prohibited contract) decided to be an illegal contract. Under the Marine Insurance Act, 1906 (which applied to foreign as well as to British ships), such a contract was made not illegal, but only void. That Act applies to marine insurance policies, and does not apply to the peace policies. The marine policies are not void under the Gaming Acts of 1845 or 1892;

(1) Sect. 4 of the Marine Insurance Act, 1906, is as follows:—"(1.) Every contract of marine insurance by way of gaming or wagering is void.

(2.) A contract of marine insurance is deemed to be a gaming or wagering contract—

(*a*) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(*b*) Where the policy is made 'interest or no interest,' or 'without further proof of interest than the policy itself,' or 'without benefit of salvage to the insurer,' or subject to any like term.

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer."

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the p.p.i. clause is not inconsistent with an insurable interest in the assured; the clause is inserted to avoid the difficulty and trouble of proving an insurable interest. Notwithstanding the existence of a p.p.i. clause, if the assured has in fact or expects to acquire such an interest as shows that he did not intend to make a wager, the policy will not be void under the Gaming Acts. And such a policy is not brought within those Gaming Acts by means of s. 4 of the Marine Insurance Act, 1906, which declares that every policy containing a p.p.i. clause is deemed to be a gaming and wagering contract. The definition of such a contract for the purposes of that Act cannot enlarge the meaning of the term "contract by way of gaming or wagering" in the Gaming Act, 1845: see Arnould on Marine Insurance, 10th ed., s. 315, at p. 434, and Mr. Arthur Cohen's article in Halsbury's Laws of England, vol. xvii., para. 746, p. 377. These policies are prima facie consistent with the assured having an insurable interest, and it is for the liquidator to show the contrary. The assured has paid the losses under the original policies and that is prima facie proof of interest; until the liquidator has proved that the reassured were not liable to pay the losses, it must be assumed that they were liable. The detachable p.p.i. slip constituted an undertaking by the company that it would not raise the point as to the absence of an insurable interest. It was such an honourable undertaking as the liquidator ought to give effect to. The Life Assurance Act of 1774 does not apply at all to contracts by way of gaming or wagering, but only to contracts of insurance in the ordinary sense of the word: Halsbury's Laws of England, vol. xvii., s. 4, "Wager policies: The Gambling Act, 1774"; at p. 514. If the policies are within the Gaming Acts, then the policies being void and the consideration having failed, the holders are entitled to a return of their premiums.

MacKinnon K.C., *Le Quesne* and *H. Claughton Scott*, for Alrik Sunden-Cullberg and Hamilton Smith & Co. These are all genuine marine policies. The liquidator ought to act in accordance with the stipulation on the p.p.i. slips attached to the policies and admit the claims thereunder:

Ex parte James. (1) In that case the Court directed money paid to a trustee in bankruptcy in mistake of law to be repaid to an execution creditor. James L.J. said: "I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far . . . . I am of opinion that a trustee in bankruptcy is an officer of the Court . . . . and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."

[P. O. LAWRENCE J. That principle was applied because the Court was acting. How does the principle apply to a voluntary liquidator ?]

There is no necessity for treating a liquidator as a litigant defendant. As an officer of the Court he should be impartial between the persons whose interests are involved in the winding up: *Gooch's Case* (2); *Ex parte Simmonds.* (3) Although there is no case where the principle has been applied to a liquidator in voluntary winding up, it is submitted there is no reason why the principle should not extend to such a case: *In re Wigzell* (4), where it was held that there was nothing dishonest in a trustee in bankruptcy enforcing rights given him by the Legislature.

[P. O. LAWRENCE J. How can I apply that principle to a case where an Act says that certain things are null and void, because it is really against public policy ?]

If the transactions were mere bets, the liquidator ought not to pay. But they are not mere betting transactions. The claimants have genuine insurable interests; they have paid the whole of the losses. It is a pure technicality if the reinsurers can refuse payment on the ground of the insertion of the p.p.i. clause. The Court leans in favour of there being

(1) (1874) L. R. 9 Ch. 609, 614.
(2) (1872) L. R. 7 Ch. 207, 211.
(3) (1885) 16 Q. B. D. 308.
(4) [1921] 2 K. B. 835.

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an insurable interest, where the underwriters have been taking the premiums: *Stock* v. *Inglis*. (1) The liquidator may deal with the claims on the footing that the p.p.i. clauses were deleted: *Gedge* v. *Royal Exchange Assurance Corporation*. (2) As to the Sunden-Cullberg policies: the p.p.i. clauses were inserted in the policies without the authority of the reinsurers; there were no p.p.i. slips. The firm of brokers, the nominal agents of Sunden-Cullberg, the reinsurers, were practically the same as the reinsuring company itself, and the policies were retained in the possession of the firm or the company, and the presence of the p.p.i. clauses was unknown to the reassured. As to the Hamilton Smith policies: the short slip governs the contract if there is any variation between the short slip and the long slip. In the case of some of those policies, the short slip did not contain the p.p.i. clause, neither did the policies made out from those short slips; consequently those policies ought to be rectified by deleting the detachable slips, so as to make the policies correspond with the contracts concluded by the original (short) slips.

Whinney in reply. These peace policies are policies of insurance within the Gambling Act of 1774, or are null and void under the Gaming and Wagering Act, 1845: Halsbury's Laws of England, vol. xvii., s. 1012, at p. 514. A policy is a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to: *Wilson* v. *Jones*. (3) That is the form the peace policies took. An interest in an event is defined in *Barclay* v. *Cousins* (4) and *Lucena* v. *Craufurd* (5) that if the event happens the party will gain an advantage, if it is frustrated he will suffer a loss. These are policies, and the claimants under them can prove in respect of a loss and recover by way of indemnity. The reinsurers are only liable in cases where the original insurances are good. Even if the onus is on the reinsurers to prove that the assured had no

(1) (1884) 12 Q. B. D. 564.
(2) [1900] 2 Q. B. 214, 221.
(3) (1867) L. R. 2 Ex. 139.
(4) (1802) 2 East, 544.
(5) (1802) 3 B. & P. 75.

interest, there is evidence on the face of the policies and their terms that no subject matter of risk is stated. They were either illegal as gambling policies under the Act of 1774, or were null and void as bets under the Gaming and Wagering Act, 1845: Halsbury's Laws of England, vol. xvii., s. 746, at p. 377. If these policies are merely bets, the reinsured cannot insure against having to pay a debt of honour, because no legal loss or damage could be proved. As regards the Sunden-Cullberg and Hamilton Smith marine policies: the p.p.i. slip forms part of the policy, whether it remains attached or has been detached at the time the claim is made under such policy. If when the policy is issued, the p.p.i. slip is attached, it forms part of the contract, and it is immaterial that it has been torn off even by arrangement or permission afterwards; the policy cannot remain void for a period and then suddenly become valid because the slip is torn off; every term of the insurance must be contained in the policy: *Cheshire & Co.* v. *Vaughan Bros. & Co.* (1) The present case does not fall within the principle of *Ex parte James.* (2) All the cases are concerned with a trustee in bankruptcy or a liquidator in a compulsory winding up. Even if the liquidator here can be treated as an officer of the Court it is submitted that on the authority of *In re Wigzell* (3) he ought not to be directed to pay a voluntary debt which the company is not legally liable to pay, unless by way of compromise for the benefit of the estate as a whole: see also *Granville & Co.* v. *Firth.* (4) As to rectification, there is no evidence of a common mistake or a mistake by either of the parties. The short slip contains the proposed terms of the contract, but there is no reason why the assured should not send in closing instructions by means of a long slip amplifying or varying the short slip, and if accepted by the company such instructions make a good contract, and the short slip is superseded. As to the Sunden-Cullberg policies: if in fact the p.p.i. clause was unauthorized it is not claimed that those policies are bad, especially as Davies, who was acting

(1) [1920] 3 K. B. 240.
(2) L. R. 9 Ch. 609.
(3) [1921] 2 K. B. 835.
(4) (1903) 88 L. T. 9.

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as broker, was also a director of the company with which he was dealing.

Werninck for B. N. L. Whiteaway.

Cur. adv. vult.

Feb. 22. P. O. LAWRENCE J. The first question which arises on this summons is as to the validity of the peace policies.

In my judgment these policies are not contracts of marine insurance. It is true that they are made out on the printed form which the company generally uses for its marine policies, but that fact alone does not, in my opinion, make them marine policies. None of the printed clauses contained in these policies have any application to the subject matter of the insurance, and when the substance of these policies is looked at, it is obvious that the losses insured against are not losses incident to any marine adventure. These policies therefore do not come within the definition of contracts of marine insurance contained in s. 1 of the Marine Insurance Act, 1906, and the provisions of that Act do not apply to them.

The next question to be determined is whether these policies are insurances forbidden by the Life Assurance Act, 1774 (14 Geo. 3, c. 48).

Although it would appear from the title of this Act as if the Act were confined to life insurances, yet its operative part extends to insurances on any events whatsoever except insurances on ships, goods, and merchandise. This Act, however, does not extend to all contracts by way of gaming or wagering, but is confined to contracts of insurance.

The first matter to be considered, therefore, is whether these policies are insurances within the true meaning and intent of s. 1 of the Act. In *Wilson* v. *Jones* (1) Blackburn J., in pointing out the distinction between a policy of insurance and a mere wager, defines a policy as a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to. Applying

(1) L. R. 2 Ex. 139, 150.

that definition to the facts of this case, it will be seen that in form these policies undoubtedly are contracts of insurance, as they purport to indemnify the assured against loss in the event of peace not being declared before a certain date. Moreover, the policies were all effected by way of reinsurance having been issued to Mr. Chatelain as broker on behalf of the Lloyds de France Insurance Co. and the English and Foreign Insurance Co. for the purpose of re-insuring the risks undertaken by those companies under certain policies issued (also by way of reinsurance) to certain underwriters at Lloyds, who had underwritten the original policies. In these circumstances I am clearly of opinion (and indeed Mr. Stuart Bevan in the course of his argument felt himself constrained to admit) that the peace policies purport to be contracts of insurance in the ordinary sense of the words and not mere wagers.

That being so, the next question arises whether these policies are insurances on some event wherein the assured has no interest, or insurances by way of gaming or wagering within the meaning of the Act of 1774, and consequently illegal and void.

In my opinion the fact that the policies contain the p.p.i. clause does not of itself prove that the assured has no insurable interest in the subject matter of the insurance, or that the policies are gaming or wagering policies, as that clause may have been inserted on account of some difficulty in proving interest. Mr. Stuart Bevan has called my attention to the judgment of Brett M.R. in *Stock* v. *Inglis* (1), where that learned judge states that in his opinion it is the duty of the Court always to lean in favour of an insurable interest, if possible, and I have assumed that this opinion correctly expresses the attitude in which the Court ought to approach the present case. In my judgment, however, the facts disclosed by the evidence here are such that it is impossible to hold that the assured had any insurable interest. In my opinion the description of the subject matter of the insurance, the existence of the p.p.i.

(1) 12 Q. B. D. 564, 571.

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and f.i.a. clause on all the policies, and the absence of any attempt on the part of the claimants to prove that the original assured had any insurable interest, lead to the irresistible inference that these policies were insurances by way of gaming or wagering, and I should require the clearest possible evidence to convince me to the contrary. If I were to accede to the argument addressed to me by Mr. MacKinnon that I ought to uphold these policies, because the original assured might possibly have had some insurable interest, I should be shutting my eyes to the true nature of these policies and stretching the rule expressed by the Master of the Rolls in *Stock* v. *Inglis* (1) beyond its proper limits.

The fact that the policies are reinsurance policies and that the reassured have paid under the policies which they have issued does not in my judgment operate to enable them to substantiate their claims against the company. It is well settled that (subject to any provision to the contrary in the reinsurance policy) the reassured, in order to recover from their underwriters, must prove the loss in the same manner as the original assured must have proved it against them, and the reinsurers can raise all defences which were open to the reassured against the original assured. This is equally true whether the reassured had or had not paid their assured, inasmuch as it would be inequitable for them to renounce any of their defences so as to prejudice the reinsurers : see the article written by the late Mr. Arthur Cohen in Halsbury's Laws of England, vol. xvii., s. 744, p. 375. Nor does the fact that the reassured in this case were only themselves reinsurers assist the claimants, as it only operates to throw the position one step further back.

If it once be established that the original insurances were illegal, it follows in my judgment that all the reinsurances are tainted with that illegality and are themselves illegal and void. In the result I hold that the peace policies are gaming or wagering policies within the meaning of s. 1 of the Act of 1774, and are consequently illegal and void. It

(1) 12 Q. B. D. 564.

follows from the fact that these policies are illegal that the claimants cannot recover either the amounts thereby insured or the premiums paid for effecting them.

A further point, however, was taken on behalf of the claimants—namely, that the company had agreed not to dispute the claims under these policies in consideration of the claimants supporting the scheme of arrangement which was then about to be submitted to the creditors for their approval.

There are at least three answers to this contention, each of which in my opinion is conclusive. In the first place, the letter of December 30, 1918, which was relied upon as constituting the bargain, was not in fact written on behalf of the company, and therefore does not bind the liquidator. In the second place a bargain not to dispute a claim arising under an illegal contract is one which the Court would not give effect to under any circumstances, much less where it purports to affect persons who were no parties to it. In the third place this bargain, which, if valid, would have materially affected the rights of the general body of creditors, was not disclosed to the Court when asked to sanction the scheme, and therefore the Court ought not to pay any attention to it when adjudicating upon the rights of the creditors in the liquidation.

In the result I propose to make a declaration that the liquidator ought not to admit any claims under the peace policies either for the moneys purporting to be assured thereby or for the return of the premiums paid in respect thereof.

The next policies as to which questions arise are those issued by the company to Hamilton Smith & Co. These are undoubtedly marine policies. They were taken out to reinsure genuine marine risks which the reassured had underwritten and were in no sense gaming or wagering policies.

The first question which arises on these policies is whether the fact that a detachable p.p.i. clause was gummed on to the policies when they were signed and issued does not render them void under s. 4 of the Marine Insurance Act, 1906. In

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my judgment there is no difference between the policies which still have the p.p.i. clause attached to them and those from which the p.p.i. clause has been detached. It is not necessary to consider what course the Court would have adopted if, before the policies had been brought to its attention, the p.p.i. clause had been detached, and neither of the litigating parties had raised the point that such a clause had ever formed part of the policies, because in the present case evidence has been adduced on behalf of the liquidator which proves clearly that the p.p.i. clause was attached to all the policies when they were signed and handed to the assured. In my judgment the proper time to judge whether these policies are valid or void is *at* the time when they are issued. The subsequent tearing off of the p.p.i. clause by the assured (even though it was done with the permission of the insurers) cannot in my opinion have the effect of rendering the policies valid if they were null and void when they were issued.

It was contended, however, that the Court ought not to regard any of these policies as p.p.i. policies, because of the introductory words preceding the p.p.i. clause on the detachable slip, which stipulate that the p.p.i. clause is no part of the policy, but is to be binding in honour on the underwriters and may be removed by the assured. In my opinion this contention cannot prevail. The stipulation relied upon is a palpable, and, in my opinion, wholly futile attempt to evade the provisions of s. 4 of the Act of 1906. A stipulation that an important clause affecting the whole tenor of the policy should form no part of the policy and might be removed by the assured stands self-condemned and cannot in my opinion have the effect of making the policy what it is not—namely, a policy not containing such a clause. Moreover, the statement that the p.p.i. clause should be binding on the insurer in honour only does not affect the position at all, as, even without that statement, the clause would not have bound the insurers in any other way. The policies as issued were in substance and in fact p.p.i. policies and the effect of attaching the p.p.i. clause was in my judgment to render the policies void by virtue of the provisions of s. 4 of the Act

of 1906. In my judgment therefore, unless the assured can succeed in their claim for rectification, all the policies to which the p.p.i. clause was attached at the time of issue are void.

The question then arises whether the claimants are entitled to have these policies rectified by striking out the p.p.i. clause. It is argued that the Court ought to rectify the policies because the short slips, which it is said contain the true terms of the bargain arrived at between the parties, did not stipulate for a p.p.i. clause. In my opinion the claim for rectification cannot possibly succeed as there is no evidence whatever of a common or even of a unilateral mistake. The reason why the company attached the p.p.i. clause to these policies is because the closing instructions expressly stipulated that the policy should be a p.p.i. policy. It is true that none of the short slips mentioned the p.p.i. clause as one of the terms of insurance, but (according to the custom prevailing where the insurer is a company) these short slips were in each case followed by the long slips or closing instructions drawn up by or on behalf of the assured and presented to the company in order that the company might prepare the policy in the terms of these long slips. In every case the long slips contained instructions for the insertion of a p.p.i. clause, and I have no doubt whatever that the assured desired to have p.p.i. policies.

It was suggested that the long slips did not contain the real terms agreed upon, but were prepared by office boys or clerks who had no authority to insert the instructions for a p.p.i. clause. Even if this suggestion were true it does not prove that the company made any mistake, but as a matter of fact there is no evidence whatever to support the suggestion. The true inference to be drawn from the evidence is that the long slips were prepared in the office of the brokers and presented to the company in the ordinary course of business. In these circumstances the Court cannot possibly assume that the persons who made out the long slips acted without authority, more especially as Mr. Hobbs, a director of Hamilton Smith & Co., Ld., has made a long affidavit and has not ventured to say that the insertion of the p.p.i. clause in the

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closing instructions was not authorized by him. No doubt the company could, without any breach of faith, have refused to issue p.p.i. policies because when it underwrote the risk on the short slips the p.p.i. clause was not mentioned, but as a matter of fact the company in every case accepted the closing instructions without demur, and issued policies in accordance with those instructions. The policies were accepted by the reassured with full knowledge that they contained the p.p.i. clause in accordance with the closing instructions; and in the circumstances it is plain that the terms contained in the short slips were by agreement between the parties superseded by the terms which were eventually embodied in the final contracts of insurance. The policies therefore contain the real terms agreed upon between the parties, and in my judgment the claim that they should now be rectified at the instance of the assured by omitting the p.p.i. clause is a hopeless claim, and one which the Court cannot possibly entertain.

But then it is contended that the Court ought to order the liquidator to admit the claims under these policies, in spite of the fact that they are void, on the ground that the liquidator is in the position of an officer of the Court and that the principle that the Court ought to be as honest as other people (per James L.J. in *Ex parte James* (1)) and will direct its officers to do that which any high-minded man would do (per Lord Esher M.R. in *Ex parte Simmonds* (2)) applies to the facts of this case.

It is said that, as these policies were not in fact gaming or wagering policies, and as actual loss could in each case be proved to have been sustained, not only by the reassured but also by the original assured, the liquidator would only be acting as an honourable man would act if he were to admit the claims, and therefore the Court ought to compel him to admit them notwithstanding the statute makes the policies void. In my judgment the Court cannot possibly accede to this contention. Even if the voluntary liquidator were in the position of an officer of the Court for this purpose (which I think is open to doubt), I am of opinion that the doctrine

(1) L. R. 9 Ch. 609, 614. (2) 16 Q. B. D. 308, 312.

has no application to a case such as this where a claim is made under a contract which the Legislature has for sufficient reasons thought fit to declare void.

Under s. 4, sub-s. 2 (*b*), of the Act of 1906 every policy containing the p.p.i. clause is to be deemed to be a gaming or wagering policy and therefore it is void under s. 4, sub-s. 1, whether it is in fact a gaming or wagering policy or not: see *Cheshire & Co.* v. *Vaughan Bros. & Co.* (1), p. 240. Moreover it is by no means clear that the Court, on having its attention drawn to the p.p.i. clause, ought not to treat the policies as void, even though the parties themselves may not desire to have them so treated. In these circumstances it is in my opinion hopeless to contend that the Court ought to hold that it is contrary to honourable or high-minded conduct for an insurer (or, as in this case, a liquidator of an insolvent insurer) to rely on the provisions of this section. To order the liquidator to admit these claims would in effect be repealing this section so far as this liquidation is concerned: see *In re Wigzell.* (2)

There remains to be considered the question whether the claimants under these policies are entitled to the return of the premiums which they have paid. Having regard to the fact that the Act 19 Geo. 2, c. 37, which rendered marine policies effected by way of gaming or wagering illegal, was repealed by s. 92 of the Act of 1906, and that the latter Act merely renders such policies void, I am of opinion that the claimants are entitled to prove for the amount of the premiums paid by them in respect of these policies. It is admitted that the original assured, and therefore the reassured, had an insurable interest in the subject matter of the policies and that there was no fraud or illegality on the part of the assured or reassured or their agents. In these circumstances I am of opinion that, as the consideration for the payment of the premiums has totally failed, s. 84, sub-s. 1, of the Act of 1906 applies and the premiums are returnable by the company. In my judgment therefore the liquidator ought to admit the claimants under these policies as creditors in respect of the premiums paid by them.

(1) [1920] 3 K. B. 240. (2) [1921] 2 K. B. 835, 863.

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I propose accordingly to make a declaration that the liquidator ought not to admit the claimants under the policies issued to Hamilton Smith & Co., Ld., or under any other marine policies to which the p.p.i. clause was at the date of issue attached (except the Sunden-Cullberg policies which have yet to be dealt with), as creditors in respect of the moneys thereby insured, but ought to admit them as creditors for the amount of the premiums paid by them to the company.

I now come to the Sunden-Cullberg policies which relate to the steamers *C. Sundt*, *Robert*, and *Theodor Williams*. These policies stand on an entirely different footing from the Hamilton Smith policies, and the liquidator has by his counsel stated that he is not in a position to contest the claims made by the assured under them. In these circumstances I will content myself by stating quite shortly why I think the Court is justified in holding that these policies ought to be treated as rectified by deleting the p.p.i. clause. Mr. Davies, the managing director of the company, acted as broker for the Stockholm firm, who had instructed him to reinsure certain risks which they had underwritten. I am satisfied on the evidence that the instructions given to Mr. Davies by the Stockholm firm were instructions to effect ordinary reinsurance policies and that the Stockholm firm never contemplated having p.p.i. policies and never knew until after the liquidation that p.p.i. policies had in fact been issued. As Mr. Davies was the managing director of the company, both short and long slips seem to have been dispensed with and Mr. Davies himself signed and issued the policies. In these circumstances he either made a mistake which must be treated as a common mistake or else he knowingly exceeded his instructions, in which case the company cannot take advantage of the wrongful act of its own managing director. The assured have produced satisfactory proof of interest and loss, and I therefore propose to make a declaration that the liquidator ought to admit the claimants under the Sunden-Cullberg policies as creditors in respect of the amounts covered by their policies.

In conclusion I will only add that the policies referred to

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under the headings (*d*), (*e*) and (*f*) in the summons are covered by my decision in the *Hamilton Smith Case*, as it appears from the exhibits to the liquidator's affidavit that p.p.i. clauses are attached to all these policies.

That being so, I am relieved from dealing with the further objection to the policy mentioned under head (*e*) of the summons on the ground that it is made subject to the term "warranted f.a.a. without 'benefit of salvage,'" as to the effect of which I prefer not to express an opinion.

The costs of all parties to this application will be taxed as between solicitor and client and retained and paid by the liquidator out of the assets.

Solicitors: *Wansey, Stammers & Co.; Hicks, Arnold & Bender; Simmons & Simmons; Waltons & Co.; Richards & Butler.*

H. C. H.

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March 2, 24; *April* 5.
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May 8, 9.

[1921. S. 1725.]

Bankruptcy—Bets paid by Cheque—Trustee's Right to recover—Action by Trustee—Officer of Court—Stay of Action—Gaming Act, 1835 (5 & 6 *Will.* 4, *c.* 41), *s.* 2—*Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 18, 38, 45, 53.

In 1919 the debtor paid the defendant, a bookmaker, various cheques for bets lost on horse racing, and these cheques were cleared through various banks, as holders. On August 30, 1920, the debtor was adjudicated a bankrupt, and on March 30, 1921, his trustee in bankruptcy, by the direction of his committee of inspection, commenced this action in the King's Bench Division to recover 955*l.*, the amount admitted to be due, if recoverable. The action was transferred to the judge in bankruptcy under r. 123 of the Bankruptcy Rules, 1915. The defendant took the point that such an action ought not to be brought by an officer of the Court, as the claim, however legal, was practically dishonest, and that all Courts must recognize and apply the rule in *Ex parte James* (1874) L. R. 9 Ch. 609, 614. During the argument, however, in order to avoid any question of jurisdiction, the defendant was by consent given leave to serve a notice of motion in bankruptcy to stay all further proceedings, and the case proceeded on the footing that that motion was before the Court sitting in bankruptcy:—

Held by Astbury J., that there being no special circumstances in the case, it was neither honourable nor high-minded for the trustee in

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bankruptcy, as an officer of the Court, to bring or maintain such an action, and that all further proceedings must therefore be stayed.

Rule in *Ex parte James* L. R. 9 Ch. 609, 614 applied.

In re Thellusson [1919] 2 K. B. 735; *In re Wigzell* [1921] 2 K. B. 835; and other cases illustrating the nature and scope of the rule considered.

On appeal:—

Held, by the Court of Appeal (reversing the decision of Astbury J.), that the claim the trustee in bankruptcy was seeking to enforce was in respect of a debt which under the Gaming Act, 1835, s. 2 and the decision of the House of Lords in *Sutters* v. *Briggs* [1922], 1 A. C. 1 was a statutory debt, and that there was nothing in *Ex parte James* L. R. 9 Ch. 609, 614 or in any of the cases in which the rule in that case had been followed which entitled the Court to say that if and when a right of action in respect of such a debt vested in a trustee in bankruptcy, it was a dishonest or dishonourable thing for him, as an officer of the Court, to enforce it.

Held, therefore, that judgment for the trustee in bankruptcy must be entered in the action for the amount claimed.

ACTION AND MOTION TO STAY.

In 1919 Scranton paid the defendant, a bookmaker, various cheques for bets lost on horse racing, and these cheques were cleared through various banks as holders. On August 30, 1920, Scranton was adjudicated a bankrupt, and on March 30, 1921, the trustee in bankruptcy by the direction of his committee of inspection commenced this action in the King's Bench Division to recover 955*l.* the amount admitted to be due if recoverable. The action was transferred to the judge in bankruptcy under r. 123 of 1915.

The defendant took the point that such an action ought not to be brought by an officer of the Court, as the claim, however legal, was practically dishonest, and that all Courts must recognize and apply the rule in *Ex parte James*. (1) During the argument however, in order to avoid any question of jurisdiction, the defendant was by consent given leave to serve a notice of motion in bankruptcy to stay all further proceedings and the case proceeded on the footing that the motion was before the Court sitting in bankruptcy. The action was really a test case brought to determine the trustee's duty in similar cases.

The action came on for hearing before Astbury J. on March 2, 1922.

(1) L. R. 9 Ch. 609, 614.

Luxmoore K.C. and *P. B. Morle* for the defendant. The plaintiff's claim, though undoubtedly legal under the Gaming Act, 1835 (5 & 6 Will. 4, c. 41), s. 2, and the decision of the House of Lords in *Sutters* v. *Briggs* (1), is practically a dishonest claim, and the trustee in bankruptcy as an officer of the Court should be restrained from enforcing it: *Ex parte James* (2); *In re Tyler* (3); *In re Thellusson.* (4)

In *In re Wigzell* (5) the debtor drew cheques on his banking account after he knew of the receiving order, and the question was which of the two innocent parties, the bank or the creditors, was to suffer for these dishonest drawings. The Court, while fully recognizing the principle, held that it was inapplicable to such a case. There are no special circumstances of that sort here, and the principle is clearly applicable.

Barrington-Ward K.C. and *H. S. Simmons* for the plaintiff. The principle of *Ex parte James* (2) is not disputed, but, this being a pure question of ethics, not law, its application may give rise to difficulties: *In re Wigzell.* (6)

It is really a question of what is fair and right in each particular case. For instance, a trustee must not keep money that ought never properly to have been an asset of the debtor's estate—e.g., money obtained by the trustee under a mistake of law: *Ex parte James* (2); *Ex parte Simmonds* (7); or obtained by the debtor under a mistake of fact which when known would have made it improper to keep it: *In re Thellusson.* (4)

Again a life policy, concealed or unconcealed, is of course an asset, but the trustee must in fairness bear or give credit for premiums paid subsequent to its disclosure: *In re Tyler.* (3) If however all the premiums are paid before disclosure the trustee takes the paid-up policy as he finds it when disclosed: *In re Stokes* (8) approved in *In re Thellusson* (9), though criticised in *In re Wigzell.* (10) In other

(1) [1922] 1 A. C. 1.
(2) L. R. 9 Ch. 609. 614.
(3) [1907] 1 K. B. 865.
(4) [1919] 2 K. B. 735.
(5) [1921] 2 K. B. 835.
(6) [1921] 2 K. B. 835, 845.
(7) (1885) 16 Q. B. D. 308, 312.
(8) [1919] 2 K. B. 256.
(9) [1919] 2 K. B. 750, 756, 764.
(10) [1921] 2 K. B. 870.

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words the past voluntary payments do not concern him, although he is an officer of the Court. (1)

Now, whatever the ethical dicta in the above authorities may amount to, the actual decisions are far removed from the present case.

Scranton was clearly entitled to recover the 955*l.* as a statutory debt: *Cohen* v. *Hall* (2); and it was the deliberate policy of the Legislature that he should have this right: *Dey* v. *Mayo* (3); *Sutters* v. *Briggs*. (4) This statutory right of recovery, which from its very nature cannot be contrary to public policy, vested in the trustee as an asset under ss. 18, 38, 53, of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59).

The Court must not stretch its morality to an extent that amounts to a reflection on the Legislature. For instance, it must not deprive a successful defendant of costs for pleading the Gaming Acts: *Granville & Co.* v. *Firth*. (5) Surely the same principle should preclude it from depriving the creditors of an express statutory asset.

The plaintiff is merely enforcing a legal claim on behalf of the creditors. He is not seeking any equitable relief in the matter, so that there can be no question of any counter equity. It would no doubt be generous of the creditors to forego this statutory claim. But there is nothing dishonest or dishonourable in their refusing to do so. The honour of the Court cannot surely involve generosity at their expense: see *Chapman* v. *Michaelson*. (6)

There is really nothing more dishonourable in getting in a statutory asset than in evading the payment of a just debt by pleading infancy or the Statutes of Limitation. But according to the practice in bankruptcy the latter pleas are not only permissive but obligatory: Williams on Bankruptcy, 12th ed., p. 147; *Ex parte Ross*. (7)

Cur. adv. vult.

(1) Compare *Ex parte Wythes* (1885) 53 L. T. 492.

(2) [1922] 2 K. B. 37; 38 Times L. R. 150, 429.

(3) [1920] 2 K. B. 346, 356, 360.

(4) [1922] 1 A. C. 1, 25.

(5) (1903) 19 Times L. R. 213.

(6) [1908] 2 Ch. 612, 620; see also *Hand* v. *Blow* [1901] 2 Ch. 721, 730, 737.

(7) (1827) 2 Gl. & J. 330.

April 5. ASTBURY J. This is one of five actions commenced by trustees in bankruptcy in the King's Bench Division to recover under the Gaming Act of 1835 moneys paid by the bankrupts respectively, before bankruptcy, by cheques drawn in favour of and cashed by bookmakers in respect of losses incurred in betting on horse races. The actions have been transferred to and heard by me in pursuance of the practice under r. 123 of the Bankruptcy Rules, 1915.

In view of the importance involved in the question whether a claim of this character by an officer of the Court can, in the absence of special circumstances, be allowed to be made and succeed, all parties desire that this action shall be treated as a test case and that judgment in the remaining cases be reserved pending a final decision upon this point.

If the plaintiff were an ordinary party litigant he would be entitled to judgment for an agreed sum of 955*l.* and costs under the decision of the House of Lords in *Sutters* v. *Briggs* (1), but an officer of this Court he is, and therefore it is my duty to determine whether, having regard to the long established and well recognized rule referred to in *Ex parte James* (2) and in the circumstances of this case, I ought to allow such a proceeding to be sanctioned and become a practice in the administration of estates in bankruptcy.

Beyond admissions, as to the facts stated in the writ and as to the sum recoverable if the plaintiff is entitled to judgment, no evidence has been adduced on either side. The plaintiff contends that the action is to recover a statutory debt, that it has nothing to do with bankruptcy administration, that r. 123 is merely a rule of convenience, and that I have consequently no concern with the rule in *Ex parte James.* (2) The defendant on the other hand submits that the plaintiff being admittedly an officer of the Court must be so regarded by "any" judge who may try the action and that the above rule should and must in the circumstances be applied.

At a late stage in the arguments and with the assent of

(1) [1922] 1 A. C. 1. (2) L. R. 9 Ch. 609, 614.

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both parties, I gave leave to the defendant to serve a notice of motion before me as bankruptcy judge to stay all further proceedings in the action, having regard to the claim on the writ, and, neither party desiring to file or adduce any evidence on that motion beyond the admissions above referred to, the case has by consent proceeded on the footing that the motion is before the Court—subject to the agreed order as to costs in this connection that I shall deal with hereafter. I do not propose to discuss in this case whether in the action itself and without such a motion I could have dealt with the matter as I propose to do, because having regard to the grave importance of settling, once for all, the question whether claims of this character by trustees in bankruptcy are to be tolerated, I have determined, with the assistance of both parties, that this issue shall be decided by the Court, while unquestionably exercising jurisdiction in bankruptcy on the motion to stay, in order that no technical objections as to jurisdiction hereafter may prevent an authoritative decision on the merits being obtained at the earliest moment.

It is no longer arguable that the loser of a bet on a horse race who has paid his losses by cheque has not a statutory right of action to recover the money so paid, and, in the case of the person himself who has lost and so paid, the circumstances in which the law was left in its present anomalous condition when the Gaming Act of 1845 (8 & 9 Vict. c. 109), s. 15, repealed the severe provisions of the old gaming laws and left untouched the Act of 1835, which was framed to amend and alleviate, to the extent to which it went, the then harshness of those laws, are wholly irrelevant. But this is far from being the case when the Court is considering whether its own officer shall be allowed to maintain such an action in the absence of any special circumstances making it a right and honest thing to do. The plaintiff has a statutory right to maintain this action; but he is subject to any order that the Court may make under the above rule, under which the Court can refuse, if it is right to do so, to allow its officer to enforce legal or equitable rights; and this is a rule of law binding upon this Court and the Court of

Appeal, and the question which I have to decide is whether it is applicable to and should be applied in the case before me.

Before proceeding further I desire to say that the plaintiff is acting with the permission of his committee of inspection, and is only desirous of obtaining a decision as to his duty, and that of others in a similar position to himself. No sort of charge is or can be made against this trustee, who is in fact only seeking to do what he conceives to be, and what, in the absence of an authoritative decision to the contrary, is his plain duty—i.e., to reduce the bankrupt's choses in action into possession and distribute the proceeds among the creditors. When therefore I refer to the nature of this sort of claim, I desire to be understood as only referring to how honest and fair-minded people would regard it, if made by the debtor himself, or by any person in his individual capacity, and to be discussing whether the Court can allow its officer to put it forward, and incur the odium which will or may attach to him and to the Court if he is allowed to proceed.

In *In re Wigzell* (1) Lord Sterndale M.R., referring to the above rule, said: "When I find a principle laid down by a Court whose decision is binding upon me, I think the only thing I can do is humbly and faithfully to follow it to the best of my ability." This is the example and course that I desire to follow in this judgment.

In *Ex parte James* (2) a trustee in bankruptcy received moneys paid to him under a mistake of law and therefore irrecoverable. This money vested in him like that in many other cases decided on the like principle, under the provisions of the then Bankruptcy Act and was distributable thereunder among the creditors, in exactly the same way as the chose in action in the present case. But the Court ordered it to be refunded, James L.J. saying that the Court of Bankruptcy ought to be as honest as other people.

This rule or principle has been followed and applied by many distinguished judges, sitting at first instance and in the Court of Appeal, and is of wide application, especially

(1) [1921] 2 K. B. 835, 851. (2) L. R. 9 Ch. 609, 614.

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in the administration of estates in Chancery, in the winding up of companies and in bankruptcy—and in my judgment it would be a grave disaster to the administration of justice in this country and to the honour and dignity of our Courts, if it were not followed in cases which really demand its application in the interests of honesty and fair play.

The principle was applied by the Court of Appeal in *Ex parte Simmonds* (1) in similar circumstances. Lord Esher said: "A rule has been adopted by Courts of law for the purpose of putting an end to litigation, that, if one litigant party has obtained money from the other erroneously, under a mistake of law, the party who has paid it cannot afterwards recover it. But the Court has never intimated that it is a high-minded thing to keep money obtained in this way; the Court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil, in order, that is, to put an end to litigation. But James L.J. laid it down in *Ex parte James* (2) that, although the Court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law. This rule is not confined to the Court of Bankruptcy. If money had by a mistake of law come into the hands of an officer of a Court of Common Law, the Court would order him to repay it so soon as the mistake was discovered. Of course, as between litigant parties, even a Court of Equity would not prevent a litigant from doing a shabby thing. But I cannot help thinking that, if money had come into the hands of a receiver appointed by a Court of Equity through a mistake of law, the Court would, when the mistake was discovered, order him to repay it. A trustee in bankruptcy has always been treated as an officer of the Court of Bankruptcy, and the Court will order him to act in an honourable and high-minded way, and so it was laid down by James and Mellish L.JJ. in *Ex parte James*." (2)

Of the great mass of cases in which this principle has been

(1) 16 Q. B. D. 308, 312. (2) L. R. 9 Ch. 609, 614.

applied, in Chancery and bankruptcy especially, I will only refer to a few.

In *In re Tyler* (1) a bankrupt's wife had kept up a policy on his life by paying the premiums after his adjudication until his death, and the Lords Justices—assuming that she had no legal rights—ordered repayment to her by the trustee out of the policy moneys received by him of what she had paid. Farwell L.J. said: "On this general question, which is one of some importance, and is quite familiar in the administration of estates in the Chancery Division, I should like to say what is my understanding of the principle on which the Court proceeds, because it is obvious that this discretion cannot be left to be regulated according to the length of the foot, to use an old phrase, of the particular judge who has to exercise it. Our Courts have two functions, one to decide rights between the parties and the other to administer estates. In administering estates, whether in Chancery, bankruptcy, or the winding up of companies, the Court itself by its officer often finds itself in the position of a quasi-litigant. As I understand the principle laid down in the cases to which my Lord has referred, it comes to this, that the officer of the Court is bound to be even more straightforward and honest than an ordinary person in the affairs of every-day life. It would be insufferable for this Court to have it said of it that it has been guilty by its officer of a dirty trick. Test that by the case before James L.J. (2) of money paid under mistake of law. Theoretically both sides know the law. Therefore the man who is receiving knows that he is receiving that to which he is not lawfully entitled. No high-minded man, of course, would dream of doing such a thing, and the Court will not allow its officer to put it in the position of insisting upon its right to keep money which it has received from a third party, with full knowledge that he was not bound to pay the money, and also with full knowledge that he was not aware of that fact. The rule of law may be so, but the Court will not allow its officer to act upon it. In this case I will assume that this

(1) [1907] 1 K. B. 865, 871. (2) L. R. 9 Ch. 609, 614.

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lady had not a charge on the policy moneys for the premiums she had paid." Buckley L.J. said (1): "In *Ex parte James* (2), James L.J. speaks of money which in equity belongs to some one else. In my judgment he there meant money which in point of moral justice and honest dealing belongs to some one else. He was using the words in a popular sense, and not in the sense of money which in a Court of equity would belong to some one else. I think the context of his judgment plainly shows that that was his meaning. In *Ex parte Simmonds* (3), Lord Esher, referring to *Ex parte James* (2), says that the Court will direct its officer to act as any high-minded man would act, namely, not to take advantage of a mistake of law. That is to say, assuming that he has a right enforceable in a Court of Justice, the Court of Bankruptcy or the Court for the administration of estates in Chancery will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest man would do. In *Ex parte Simmonds* (3) the Court were extending the doctrine of *Ex parte James* (2) in this sense, that they were holding, not merely that if the trustee had the money still in his hands he ought to hand it to the person who in point of justice was entitled to it, but that if he had parted with the money but there was other money coming in from the bankruptcy he ought out of such other money to make good the fund which he had by error misappropriated."

In *In re Thellusson* (4) the facts were as follows: "In October, 1918, a bankruptcy notice was served on the debtor and on January 2, 1919, a receiving order was, without his knowledge, made against him. On the following day the applicant, who was also ignorant of the receiving order having been made, or that the debtor had committed an act of bankruptcy and a bankruptcy petition had been presented against him, lent the debtor a sum of money. At the time the loan was made, the debtor knew that the petition had been set down and that the hearing had been fixed for the

(1) [1907] 1 K. B. 873.
(2) L. R. 9 Ch. 609, 614.
(3) 16 Q. B. D. 308, 312.
(4) [1919] 2 K. B. 735.

preceding day. He had consulted his solicitors, but, as he did not provide them with sufficient funds, they did not appear at the hearing of the petition. On an application by the applicant that the loan transaction might be declared void and the Official Receiver, as the trustee of the property of the debtor, ordered to repay to the applicant the balance of the loan remaining in his hands, it was held that the Court in bankruptcy ought not to allow its officer to insist upon a rule of law or equity in the administration of an estate in bankruptcy under the control of the Court, where insistence would produce an unjust and dishonest result; and that inasmuch as if the debtor had known on January 3 of the receiving order it would have been dishonourable of him to receive the money, the trustee ought to be directed to refund it." In this case Horridge J. said (1): "The last contention on behalf of the applicant, which I think was a rather desperate one, was that the present case came within the principle of *Ex parte James* (2), where the Court of Appeal held that the principle that money paid under a mistake of law is irrecoverable must not be stretched so as to cover a case where a trustee had been paid money by a sheriff to which he had no right. In the present case, in my opinion, there is no principle on which this contract could be set aside. There is no reason why there should be any equity affecting the trustee arising out of the transaction. The trustee is merely doing his duty in saying 'I cannot repay money which I am entitled to retain as the property of the bankrupt.'" But the Court of Appeal unanimously took a very different view, notwithstanding the fact that the trustee had taken no steps, except to insist upon his legal right to retain money which the Bankruptcy Act vested in him. Warrington L.J. said (3): "The question in this appeal is whether the circumstances of this case justify the exercise by the Court of the jurisdiction it has often asserted of directing its officer—in this case a trustee in bankruptcy—to pursue a line of conduct which an honest man actuated by motives

(1) [1919] 2 K. B. 738. (2) L. R. 9 Ch. 609, 614.
(3) [1919] 2 K. B. 743.

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of morality and justice would pursue, although not compellable thereto by legal process." After referring to *Ex parte James* (1) and *Ex parte Simmonds* (2) he added (3): "In both these cases it will be observed that there was nothing dishonest on the part of the trustee in demanding and receiving the money in question; in each case he reasonably believed that he was entitled to it. What the Court thought would be dishonest was that he should retain the money when the mistake had been pointed out." He then referred to *In re Tyler* (4) and *In re Hall.* (5) The facts and decision in the latter case were as follows: "The bankrupt having mortgaged two fishing boats to some fish salesmen to secure his current account with them, and having subsequently failed in his business, the mortgagees offered to pay his creditors a composition which nearly all the creditors agreed to accept, and, after having notice that the debtor had committed an act of bankruptcy, they paid this composition in good faith to the assenting creditors, believing that they were entitled under their mortgage to add the money so paid to their security. They then sold the fishing boats, and claimed to retain the balance of the proceeds of sale, after paying themselves the amount due on their mortgage at the date of the act of bankruptcy, on account of the composition paid to the creditors. The official receiver applied that the balance might be paid over to him; and it was held that the mere fact that the mortgagees were not familiar with the working of the bankruptcy law was not a ground for precluding the official receiver from insisting on his right to treat this balance as part of the debtor's estate, and that the money ought to be paid over to him." Warrington L.J. in *In re Thellusson* (6) then continued: "But it is said that in *In re Hall* (5), decided after but on the same day as *In re Tyler* (4), there are expressions which show that the principle expounded in *In re Tyler* (4) is not to be taken to be as wide as the judgments in that case would

(1) L. R. 9 Ch. 609, 614.
(2) 16 Q. B. D. 308, 312.
(3) [1919] 2 K. B. 747.
(4) [1907] 1 K. B. 865.
(5) [1907] 1 K. B. 875.
(6) [1919] 2 K. B. 749.

appear to make it. It is said it is only applied where the trustee has been pursuing what the Court thinks is a dishonest course of conduct and appears to be minded to continue it. If the judges really intended so to limit that principle it would be an extraordinary thing that they did not do so in *In re Tyler* (1), when they were deliberately expounding the principle, but reserved the limitation for the judgment delivered immediately afterwards in a case in which the principle in its wider scope was plainly inapplicable. The judgment mainly relied upon is that of Farwell L.J. He there says (2): 'The distinction between this and the last case (*In re Tyler* (1)) is to my mind apparent. In this case the officer of the Court has neither done nor omitted anything which could give rise to the suggestion that he has committed the Court to a course of conduct which is in any way unworthy of its dignity. The mortgagees choose to make these payments of 4*s.* in the pound on their own initiative without a suggestion from the trustee, in the hope of avoiding the bankruptcy by carrying through the composition. I have already explained that the principle is that the officer of the Court must not embark upon a course of conduct, either of omission or commission, which is unworthy of the Court so as to commit the Court to acts which it would feel bound to repudiate. In the last case, for example, my judgment proceeded on the knowledge of the trustee in the bankruptcy of the existence of the policies and the necessity for paying the premiums and the fact that the wife was paying them. Different considerations would have arisen altogether if the trustee had been ignorant of the existence of any policy at all and then, after the life had dropped, the wife had come to the trustee and said that she had been paying the premiums. That would have been a mere mistake of law, which I will deal with when it arises, but certainly I should require to consider a good deal more closely before I decided that case in favour of the wife, because to my mind the principle rests on the act or omission of the trustee in bankruptcy acting as the officer of the Court, and not on

(1) [1907] 1 K. B. 865. (2) [1907] 1 K. B. 879.

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any mere mistake made by a third person with whom the officer has nothing to do.'" Warrington L.J. continued (1): "This is I think consistent with the view that it is enough in order to apply the principle to find as to the thing which the trustee is about to do or omit to do that it would be dishonest to do it or omit to do it. The previous course of conduct in both parties may be material on the question whether it would be dishonest to do or omit the action in question, but that is all. I am quite sure that is all that Farwell L.J. meant in the expressions he has used. . . . . We have here a trustee in bankruptcy in possession of money of the bankrupt which he knows was lent to him by Mr. Abdy in ignorance of the fact that on the day before the payment a receiving order had been made and which would not have been so lent if the facts had been known to the lender. I think under such circumstances an honest man would on ascertaining the facts at once repay the money, and, in my opinion, the trustee must be ordered to pay the 764*l.* 0*s.* 5*d.* accordingly." Duke L.J. said (2): "The principle on which, as it appears to me, the Court is now bound to proceed in such a case as the present is that which is enunciated very distinctly in the judgments of James L.J. in *Ex parte James* (3), Lord Esher M.R., in *Ex parte Simmonds* (4); and Lord Wrenbury, then Buckley L.J., in *In re Tyler* (5)—namely, that the trustee in bankruptcy is an officer of the Court, and in deciding what is his duty with regard to a contested claim in which he is concerned as trustee, the Court must consider not merely whether he has a cause of action or right or a defence or answer which would prevail at law or in equity as between ordinary litigants, but also what in point of honesty the trustee ought to do in respect of the facts of the case. The position of the trustee in bankruptcy as an officer of the Court is the material matter." Later on he said (6): "What has been said by Farwell L.J. (7)

(1) [1919] 2 K. B. 750.
(2) [1919] 2 K. B. 754.
(3) L. R. 9 Ch. 609, 614.
(4) 16 Q. B. D. 308, 312.
(5) [1907] 1 K. B. 865, 873.
(6) [1919] 2 K. B. 755.
(7) [1907] 1 K. B. 879.

is that the principle is that 'the officer of the Court must not embark upon a course of conduct, either of omission or commission, which is unworthy of the Court, so as to commit the Court to acts which it would feel bound to repudiate.'" Atkin L.J. said (1): "Under these circumstances the applicant claims to have the money returned to him on the footing that it would be dishonourable of the debtor to hold it as soon as he knew the circumstances and that it would be equally dishonourable of the Court of Bankruptcy through its officer, the Official Receiver, to hold it, and he relies on cases such as *Ex parte James* (2) and *In re Tyler* (3) to show that the Court will look beyond the bare legal rights of the parties and direct its officer to act as an honourable and high-minded man should. The contention of the Board of Trade, as I understand it, is that however true that proposition may be where the officer of the Court has himself done or omitted to do something which commits the Court to a dishonourable course, the rule has no application where all the officer has done is to find the debtor in legal ownership of property, and to assert his right to it as part of the debtor's property. In that case the dishonourable person is the debtor, and, however soiled his possession may be, the Court receives the property with clean hands. It becomes necessary to consider the relevant cases." After referring to *Ex parte James* (2) and *Ex parte Villars* (4) Atkin L.J. added (5): "It is to be noted that the only act or omission of the trustee [in *Ex parte James* (2)] other than the omission to repay the money when finally demanded was to claim the money in the first instance from the execution creditor. In making that claim he was asserting a view of the law which had at first commended itself to Mellish L.J. himself [in *Ex parte Villars* (4)], and the payment was made to him by the creditor and received by him after the judgment of Mellish L.J. (4) and after the creditor had received legal advice. It would be perverse to suppose that in acting as he did in claiming

(1) [1919] 2 K. B. 758.
(2) L. R. 9 Ch. 609, 614.
(3) [1907] 1 K. B. 865.
(4) (1874) L. R. 9 Ch. 432, 439.
(5) [1919] 2 K. B. 759.

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and receiving the money under such circumstances the trustee was in any way tainted with any kind of dishonour." And after dealing with *Ex parte Simmonds* (1) Atkin L.J. said (2): "There is no suggestion in the judgments that the decision turned on something done or omitted to be done by the trustee—some trick or unfair dealing or sharp practice. The reference to the mistake of the officer by Lindley L.J. (3) is the mistake not in asking for the money but in distributing it when received. Later he uses the phrase 'injustice which has been inadvertently done.'" Later on Atkin L.J. said (4): "The conclusion that I derive from the cases is that the contention of the Board of Trade in this case is inconsistent with the decisions in *Ex parte James* (5) and *Ex parte Simmonds* (1) as explained in *In re Tyler* (6) and that the principle laid down in those cases has not been qualified by the later cases. It can make no difference whether the trustee himself has acquired the property by unworthy means, or whether there is vested in him by operation of law property which has been acquired by the debtor by unworthy means. If it would be dishonourable of the debtor to use the money to pay his creditors, it is equally dishonourable for the officer of the Court, knowing the full facts, to use the money to pay his creditors. We were pressed in argument with the contention put before the Court in *In re Tyler* (7), that 'great difficulties will arise in the administration of bankruptcy if the Court is to decide according to what it considers high-minded without regard to law or equity.' I think that these difficulties are exaggerated. But while one may argue that opinions as to rules of honesty differ, the difficulty of recognising honesty when she appears, affords no adequate reason for discarding her altogether. The advantages of maintaining a high standard of commercial morality in my judgment far outweigh the suggested inconveniences of administration. If

(1) 16 Q. B. D. 308.
(2) [1919] 2 K. B. 760.
(3) 16 Q. B. D. 314.
(4) [1919] 2 K. B. 764.
(5) L. R. 9 Ch. 609, 614.
(6) [1907] 1 K. B. 865.
(7) [1907] 1 K. B. 868.

I may repeat the words of Lord Esher the proposition strikes me as a good, a righteous and a wholesome one, and I eagerly desire to adopt it."

The above principle has been further referred to and recently dealt with by the Court of Appeal in *In re Wigzell*. (1) The head-note is as follows: "A receiving order was made against a debtor who thereupon applied for and obtained a stay of the advertisement of the receiving order and all proceedings thereunder pending an appeal therefrom. The appeal was subsequently dismissed and an order was made adjudicating him bankrupt. At the date of the receiving order the bankrupt had an account at a bank. After the making of the receiving order and pending the hearing of the appeal the bankrupt paid into the bank sums amounting to 165*l*. which he had collected from his debtors, and drew out of his account sums amounting to 199*l*. The bank acted in good faith and received and paid those sums in the ordinary course of business without knowing that a receiving order had been made against the bankrupt. The trustee in bankruptcy claimed a declaration that the sums paid into the bank after the date of the receiving order vested in him as trustee:—Held, by the Divisional Court and the Court of Appeal, that the sums paid into the bank by the bankrupt after the date of the receiving order became by virtue of s. 18, sub-s. 1, s. 37, sub-s. 1, and s. 38 (*a*), of the Bankruptcy Act, 1914, the property of his trustee in bankruptcy, and that the bank were not entitled to credit themselves with the payments out to the bankrupt, as those transactions took place after the date of the receiving order and were therefore not protected by ss. 45 and 46; that there was nothing dishonest in the trustee enforcing the rights given to him by the Act, and that the action of the Court in staying the advertisement and proceedings could not operate in any way in derogation of the rights of the trustee." In the Divisional Court Salter J. said (2): "The legal right is clear. The money claimed by the trustee is vested in him and divisible among the creditors by the express terms of the Act. . . . . Legal rights can be determined with precision by

(1) [1921] 2 K. B. 835. (2) [1921] 2 K. B. 845.

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authority, but questions of ethical propriety have always been, and will always be, the subject of honest difference among honest men. The effect of exercising the jurisdiction which these decisions have asserted and defined is to deprive the creditors of money which is divisible among them by law. I feel sure that such a power should not be used unless the result of enforcing the law is such that, in the opinion of the Court, it would be pronounced to be obviously unjust by all right-minded men. . . . . In the present case the assets have been diminished, and diminished by conduct of the debtor which was equally unfair to the appellants and to the creditors. Neither the appellants nor the trustee were parties to the order staying advertisement which enabled the debtor to withdraw this money from the bank. The question is which of two equally innocent parties, the appellants and the creditors, is to suffer by the debtor's improper conduct. The law places the loss on the appellants. I think that a creditor might say, without loss of honour, that he was not called on to waive his legal rights in order to shoulder a loss which he did nothing to cause and which the law places elsewhere. I could equally well understand a creditor deciding to forego the money rather than force the bank to make it good. I think an honest man might take either view. The bank suffers hardship, no doubt, but the result is not, in my opinion, so plainly immoral as to justify a Court of law in disregarding legal right."

Legal rights can be and are, it is true, determined with precision provided the litigants in cases of real difficulty go high enough, and I am not concerned in the present case with any matter of ethical propriety which is of such a character that honest men might honestly differ about it, nor do I propose to discuss whether and in what circumstances the principle I am discussing should or could be applied in such cases; but in my humble opinion the question of its application can at least cause no difficulty, when the point is whether the Court can through its own officer allow itself to be a party to conduct which in the case of a private individual would be so dishonest or dishonourable that no honest or

decent-minded person could possibly believe it to be otherwise. It is essential to the due and faithful administration of justice that the Courts in this country should not only maintain in general a high standard of commercial morality in so far as they are enabled by law to do so, but that they should continue vigorously to insist that the conduct of their officers and the administration of estates committed to their charge shall be in strict conformity with this ideal.

In the Court of Appeal in *In re Wigzell* (1) Lord Sterndale M.R. said: "I quite agree that the first point is an important one—namely, whether the Court has power where the trustee has established a legal or equitable right to some property of the bankrupt to say: 'No, you must not enforce that legal or equitable right because you are an officer of the Court; it would not be right to do it, and the Court will not act dishonourably.' But it was decided at least thirty or forty years ago that the Court had that power, and therefore it is, I think, quite unnecessary to go through the facts and arguments with regard to that point. . . . . The Court will not allow a trustee in bankruptcy, who is its officer, to do, and certainly will not make an order that he shall do, something which in its opinion is dishonourable and not high-minded. . . . . That principle undoubtedly does give rise, in my opinion, to a very considerable difficulty, because it is only necessary to resort to it after the trustee has proved a legal or equitable title to the property. If he fails to prove a legal or equitable title he cannot have an order in his favour. But when he has proved a legal or equitable title then this principle comes in, and the Court has to inquire whether or not it is honourable and high-minded in the Court to enable him to enforce that title. I entirely agree with what was said by Atkin L.J. in *In re Thellusson* (2) that 'while one may agree that opinions as to rules of honesty differ, yet the difficulty of recognizing honesty when she appears, affords no adequate reason for discarding her altogether.' . . . . But when you once enter on the field in which there is no standard to be applied except that which each person thinks is the one of

(1) [1921] 2 K. B. 850. (2) [1919] 2 K. B. 764.

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honesty and right, the difficulty of course becomes enormously increased. To repeat Salter J.'s words (1): 'Questions of ethical propriety have always been, and will always be, the subject of honest difference among honest men.' There could not be more striking instances of that statement than the two cases of *In re Hall* (2) and *In re Thellusson* (3) which have been cited to us. In *In re Hall* (2) the judge in the Court below thought that the transaction was such an unfair one for the trustee to enforce that he would not enable him to do so. The Court of Appeal took a totally different view and said that it was a perfectly honourable transaction or claim for the trustee to enforce. On the other hand in *In re Thellusson* (3) the position was exactly reversed. In that case a learned judge of great experience in bankruptcy was of opinion that there was nothing unfair or dishonourable in the trustee enforcing his claim. The Court of Appeal on the other hand thought that there was, and in strongly worded judgments reversed the learned judge's decision and said that it was a most unconscionable claim on the part of the trustee. Those are instances of the extraordinary differences of opinion that there must be when, as Salter J. says, 'honest men are discussing ethical questions which must be the subject of honest differences amongst them.'"

I may add that the present Bankruptcy Act like its predecessors laid down in general terms what property shall vest in the trustee in bankruptcy and be distributable among the creditors, after the rule in *Ex parte James* (4) had become established, and it in no way purported to restrict or cut down its operation.

Reverting to *In re Wigzell* (5), Scrutton L.J. said: "It is a case of some little difficulty, because owing to the decisions of this Court judges sworn to administer the law and endeavouring to apply the law find themselves brought into a region which is not law, but ethics; a matter on which individual minds may easily differ." In my humble opinion I am not

(1) [1921] 2 K. B. 845.
(2) [1907] 1 K. B. 875.
(3) [1919] 2 K. B. 735.
(4) L. R. 9 Ch. 609, 614.
(5) [1921] 2 K. B. 857.

called upon however in the present case to discuss any question of ethics on which honest and individual lay minds could differ, and I would very respectfully suggest that the rule in *Ex parte James* (1) is now as fully part of the law that I am bound to administer, as the "general" provisions of the Bankruptcy Act, on which the plaintiff's claim is based. Scrutton L.J. continued (2): "Now the decisions of this Court have established that though in law the money is the money of the trustee for the creditors, yet he may be restrained from enforcing his claim to it or retaining it if (and a series of phrases none of which are very definite have been used) it were not honourable—if it were not high-minded—if it would be contrary to natural justice—if it would be shabby—if it would be a dirty trick for him to retain it—or to take perhaps the most temperate statement of the principle, which I find given by Buckley L.J. in *In re Tyler* (3) and cited with approval by Atkin L.J. in *Thellusson's Case* (4): 'Assuming that he (the officer of the Court) has a right enforceable in a Court of justice, the Court of Bankruptcy or the Court for the administration of estates in Chancery will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest man would do.' I desire to say very respectfully that it seems to me that when we have got into this atmosphere we have reached a region of uncertainty. . . . . However, there are the decisions, and this Court, accepting the principle as laid down (although certainly, as far as I am concerned, not all the dicta that have been used in some of the cases), will endeavour to apply the principle." Here again the existence of the principle is admitted and I refrain from discussing its application in border-line cases. Younger L.J. said (5): "Now speaking for myself I am not one of those prepared to be unduly critical of the principle laid down in *Ex parte James* (1) when properly applied. It would, I think, be lamentable if the Court were not free to resort to that principle and apply it in proper

(1) L. R. 9 Ch. 609, 614.
(2) [1921] 2 K. B. 858.
(3) [1907] 1 K. B. 873.
(4) [1919] 2 K. B. 762.
(5) [1921] 2 K. B. 866.

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cases, and it is to my mind owing to the necessity of leaving to the Court in such cases the power so to do for the first time exercised in *Ex parte James* (1), that it has not been thought fit in any subsequent Act of Parliament to withdraw it. But I agree fully in thinking that as a matter of prudence the Court is well advised to exercise this power only in clear cases, and, although I should be the last to seek to fetter its exercise by any words of limitation, I think, avoiding the language of metaphor, that it may not be unwise to say that whether or not it may be exercised in other cases the Court should certainly be slow to refrain from exercising it in a case, in which, in the words of Lindley L.J. in *In re Carter and Kenderdine's Contract* (2), good sense would be shocked if the Court were not empowered to do so." Later Younger L.J. said (3): "But one cannot look at *In re Thellusson* (4) without seeing that although the original transaction there was one not entered into by the trustee at all but by the bankrupt, there were circumstances in connection with the case which made it obligatory, if one may use the expression, upon the Court to apply this principle if it felt it was properly within its competence so to do. The circumstance of extreme aggravation in that case which would have been left entirely unremedied had the Court not seen fit to make the order it did make was this, that the money which had been paid after the receiving order to the bankrupt, and which still remained intact and undisposed of by him, was money of a lender for which in that then existing bankruptcy he would not have been entitled even to prove, and the consequence to him would have been that that money paid by him to the bankrupt and still intact and undisposed of would have gone to discharge the debts of every creditor of the bankrupt, if one may use the expression, other than himself. . . . . Now I think that the consideration given to *In re Thellusson* (4) in the arguments of both sides in this appeal has very clearly brought out the essential difference between applying this principle to a transaction initiated by the bankrupt himself,

(1) L. R. 9 Ch. 609, 614.
(2) [1897] 1 Ch. 776, 781.
(3) [1921] 2 K. B. 868.
(4) [1919] 2 K. B. 735.

not presumably in every case a person of the highest commercial morality, and a transaction initiated either by the trustee or the Court. In my view in considering the extent of this particular jurisdiction it is quite vital to distinguish between a trustee not insisting or the Court not permitting him to insist on all the legal consequences of, on the one hand, a transaction initiated by himself or by the Court in the interests of the general body of creditors and on the other hand a transaction initiated by the bankrupt. In the first case the creditors are the constituents of the trustee throughout, and as they are entitled to benefit by the transaction, so it does not seem to be wrong to say that they shall take it as it honourably is no more and no less. But in the second case the bankrupt has no constituents—that is to say, the transaction is initiated by him presumably in his own interests alone—and it is not obvious that a creditor with whom that transaction has been carried out and is complete, even one who in relation to it may have been tricked by the bankrupt, has any equity at all as against the other creditors of the same bankrupt, who may all have been equally tricked, merely because in his case the proceeds of the transaction can be traced amongst the bankrupt's assets, and in the other cases they cannot. Accordingly it does appear to me that while *In re Thellusson* (1) is a decision binding upon us the general extension of this principle to transactions initiated by the bankrupt as distinct from transactions initiated by the trustee is one which in future cases will have to be very jealously guarded, and as I have said this is not, in my judgment, one of these cases to which it should be applied."

In the present case as between the bankrupt and the defendant there was no wrongful or improper transaction initiated by the former, and the only question is whether the trustee ought to be allowed to maintain proceedings which no honest man would take in his own affairs. Younger L.J. next criticised (2) the decision in *In re Stokes* (3), and I desire

(1) [1919] 2 K. B. 735. (2) [1921] 2 K. B. 870.
(3) [1919] 2 K. B. 256.

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respectfully to say that in my humble opinion his criticisms are unanswerable. The result in *In re Wigzell* (1) was inevitable, the application of the rule in question being impossible in view of the express provisions of the Bankruptcy Act upon the matter in dispute, and this fact, as pointed out by Lord Sterndale M.R. (2), had previously been recognized by James L.J. himself in *Ex parte Rabbidge*. (3)

Having regard to the possible uncertainty of, and the suggested difficulty in, acting upon the principle in some cases, it is not without interest to note how seldom any trouble has arisen in this respect, notwithstanding its wide scope and application. In the two cases of *In re Hall* (4) and *In re Thellusson* (5), in which the Court of Appeal differed from the judges of first instance, the decision in each case arrived at by the Court of Appeal seems to me, if I may respectfully say so, to be free from doubt, and to have occasioned that tribunal no real difficulty, and I can hardly imagine that if a similar question to that in *In re Stokes* (6), the third case in which a difference of opinion has arisen, were to come before the Court of Appeal, the views expressed by Younger L.J. would meet with any opposition. The fact is that this principle has been consecrated by an almost unbroken record of recognition and approval.

In the administration of estates in Chancery and in bankruptcy, in the liquidation of companies, and in cases relating to wards, infants, and lunatics, the Courts are regularly and constantly called upon, in the interests of the community, to exercise a judicial discretion, and the administration of justice in these cases would soon become impossible if such a course were not permissible, and would be seriously hampered if lines too hard and fast were laid down for its exercise, having regard to the complex and often novel circumstances which from time to time call for its assistance.

Turning now to the exact point which I am called upon to decide on the motion above referred to, it may be stated to be,

(1) [1921] 2 K. B. 835.
(2) [1921] 2 K. B. 855.
(3) (1878) 8 Ch. D. 367, 372.
(4) [1907] 1 K. B. 875.
(5) [1919] 2 K. B. 735.
(6) [1919] 2 K. B. 256.

whether trustees in bankruptcy should be allowed, in the absence of special circumstances, alleged or proved by them, to bring and maintain actions like the present one, and to establish such a method of obtaining assets for distribution among creditors, as a practice in bankruptcy sanctioned by the Court. The defendant is satisfied to rest his case on the motion on the claim in the writ. I offered to allow the plaintiff to adduce any evidence he was minded in answer, proving any special or particular circumstances justifying him in proceeding with the action, and he has not been able to do so. In these circumstances I must deal with the motion and the action on the footing that the defendant is an honest man and has carried on his business, as far as the bankrupt was concerned, in an honest and straightforward manner. But it is only fair to him to put on record that the plaintiff's counsel has expressly stated that he is not in a position to make any suggestion to the contrary. The present is not a case where one of two innocent parties must suffer from the wrongful act or omission of the debtor or his trustee, nor is it a case where money has been paid by or to a third party, in circumstances which afford him moral justification in claiming to recover or retain it, as against creditors in the bankruptcy.

These being the facts, would it be an honest or honourable thing for the plaintiff to prosecute this claim, if he were an ordinary individual suing on his own behalf? My answer is that it would not—and I cannot imagine any one, with even an elementary conception of fair and honest dealing, and leaving high-mindedness on one side, holding a different view. Bookmakers carry on a business which they are perfectly entitled to engage in; and in general do so honestly and fairly, although the weaker brethren are occasionally met with on race-courses, and their numbers may be increased by those who are unable to resist the temptation now known to be afforded by the Act of 1835. The debtor induced the defendant to deal with and trust him, and to continue doing so, by paying his losses from time to time by cheques which were met in the ordinary course, he receiving his gains in the same way—

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and the Court has now to say whether it will allow its officer to recover from the defendant the balance shown in such paid and settled accounts, after setting off one set of cheques against the other.

In all the cases where a trustee has been directed to act in accordance with the principle in question, he has necessarily had a legal right, apart from the rule, in his favour, and it is in my judgment of importance in each case to determine what is the "nature" of the legal right. In many of the instances where the rule has been applied, it has consisted of a common law right in the debtor to money, which by virtue of the "general" provisions of the Bankruptcy Act has vested in the trustee. Where, however, as in *In re Wigzell* (1), the right in the trustee does not arise under some "general" provision of the Bankruptcy Act, but by reason of "express or particular" provisions, and in accordance with the policy of the Legislature appearing in the statute itself, then there is no room for the application of the rule, as explained by the learned judges who decided that case. Further, there is no case where the rule has been applied in defiance of any proved or admitted doctrine of public policy, existing under or independently of statute law.

What then is the nature or character of the trustee's legal right in this case? It arises under the Gaming Act of 1835 and the "general" provisions of the Bankruptcy Act, and it is necessary to inquire whether it can be asserted of the relevant enactment in the Act of 1835, that it forms part of any recognized branch of the public policy of this realm. The relevant provision of this Act was enacted, as the Lord Chancellor made so clear in *Sutters* v. *Briggs* (2), to correct and alleviate a hardship in the gaming laws as they then existed. In 1845 it was decided to repeal them, and since that date it has been no part of our public policy that moneys paid in respect of bets lost on horse racing shall be recoverable, as was previously the case. But the Act of 1835, which in this connection was passed to alleviate a hardship in the laws subsequently repealed in 1845, was on that occasion

(1) [1921] 2 K. B. 835. (2) [1922] 1 A. C. 1.

apparently overlooked, and that which was intended to be an amendment or correction of existing law when it was passed, became, by being allowed to remain in force after 1845, something of a very different character, and entirely out of harmony with the general intention of the new legislation, though it took nearly three-quarters of a century in this country for its continued existence to be appreciated.

The House of Lords has held that, as between ordinary parties litigant, the Courts have no alternative but to act upon this originally remedial measure, so long as it remains unrepealed, but it has refrained from going further. The result is that the plaintiff in this action has this legal right vested in him, as were the legal rights in *Ex parte James* (1), and the cases that have followed it, and no question of public policy exists here, any more than in those cases, to limit the Court in applying the rule, if the circumstances demand it.

The plaintiff relied on the fact that debts barred by the Statutes of Limitation are not provable in bankruptcy, and that debts contracted by an infant cannot, except in special cases provided for, on his becoming bankrupt after attaining his majority, be proved—and that as the plea of these statutes and of infancy is, in the case of private individuals, more or less morally discreditable according to circumstances, this fact ought not to be taken into account in the present case. But in my opinion there is no real analogy between those cases and the present one. It is part of the public policy of this country that there should be a time limit for the recovery of debts, and that a creditor who has allowed his debtor's credit to be unduly increased by his conduct must, as against his creditors in bankruptcy who have not done so, suffer for his laches and neglect. With regard to infants' contracts in general, public policy and legislation are even more explicit, debts contracted during infancy being expressly made absolutely void and incapable of ratification. Public policy does not however require that a man shall rob his bookmaker, whom he has induced to trust him by regularly paying his losses, and posing as an honourable

(1) L. R. 9 Ch. 609, 614.

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member of society, and there is no provision in the Bankruptcy Act, 1914, which, expressly or by necessary implication, provides that trustees shall be allowed to play a similarly discreditable rôle.

I have referred to the "absence of special circumstances" in claims based on the Gaming Act of 1835 by trustees in bankruptcy, as being relevant to the determination of the question whether the rule in *Ex parte James* (1) should or should not be applied in these cases, and I desire to indicate by way of example what I intend to convey in this respect. Suppose a debtor to the knowledge of a bookmaker, with whom he is dealing, pays his losses by cheques drawn on a fund of stolen money, I do not suppose that it would be incumbent upon any judge to prevent his trustee in bankruptcy taking any legitimate steps, including action under the Act of 1835, to prevent the bookmaker from so defeating the just rights of the creditors. Again, supposing that a bookmaker, relying on the same Act, sought to prove in bankruptcy for the amount of cheques drawn by him in favour of and cashed by the debtor for bets won by him, I see no reason why the trustee should not be allowed to prevent this injustice to the creditors, by setting off against such a proof the amount of bets lost and paid for by cheques drawn by the debtor and cashed by the bookmaker. The result in my opinion, therefore, is that the application of the rule in question must, in each particular case, depend upon whether there are or are not special circumstances making it unnecessary in the interests of justice to call it in aid.

On the authorities I have dealt with, and for the reasons which I have attempted to give, I am of opinion that the discretion of the Court ought to be exercised on the motion in this case—and that the reasons for doing so are à fortiori to those in any reported case upon this subject; especially in view of the deplorable practice that must otherwise necessarily grow up in the administration of estates in bankruptcy throughout the country, pending the amendment or repeal of the Act of 1835. There will, consequently, be

(1) L. R. 9 Ch. 609, 614.

an order on the motion staying all further proceedings in the action with costs. The plaintiff must pay the defendant's costs of the action down to and inclusive of the date of the service of the writ. The defendant must pay the plaintiff's costs of the action and counterclaim as from that date, less such proportion of the plaintiff's brief fees and instructions for brief, as would have been incurred if the motion had been then served. The proportion of the defendant's brief fees and instructions for brief as would similarly have been incurred by him, must be the defendant's costs in the motion. All such costs to be taxed.

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This being a test case, and brought in the circumstances that I have explained, the order will be without prejudice to the right of the trustee to take his own costs, and those ordered to be paid by him, out of the assets in the bankruptcy.

G. R. A.

C. A.

The trustee in bankruptcy appealed. The appeal was heard on May 8, 9, 1922.

On the appeal being opened it appeared that the debtor was adjudicated a bankrupt in the Manchester County Court and not in the London Bankruptcy Court, and that this fact was not known either to the counsel engaged or to Astbury J. when the case was heard in the Court below. A preliminary objection was now taken on behalf of the appellant that Astbury J. had no jurisdiction in bankruptcy to deal with the matter and that the only jurisdiction he had was that possessed by an ordinary judge of the High Court to whom an action was assigned. The case however being a test case and the trustee being anxious to obtain a decision on the main point which would afford him guidance in dealing with other cases in which there was no objection to jurisdiction, the preliminary objection was not pressed and the arguments proceeded on the footing that the matter was being dealt with in bankruptcy.

Clayton K.C., *Barrington-Ward K.C.*, and *H. S. Simmons* for the appellant.

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Luxmoore K.C. and *P. B. Morle* for the respondent.

The arguments were substantially the same as those used in the Court below and are not therefore repeated.

The following authorities were referred to: *Sutters* v. *Briggs* (1); *Ex parte James* (2); *In re Craig & Sons* (3); *Ramsden* v. *Dyson* (4); *In re Tyler* (5); *In re Hall* (6); *Tapster* v. *Ward* (7); *In re Thellusson* (8); *Herbert* v. *Sayer* (9); *Jameson & Co.* v. *Brick and Stone Co.* (10); *Cohen* v. *Mitchell* (11); *Hand* v. *Blow* (12); *Ex parte Wythes* (13); *Ex parte Villars* (14); *Ex parte Simmonds* (15); *In re Phillips* (16); *In re Stokes* (17); *In re Wigzell* (18); *Ward* v. *Fry* (19); *In re London County Commercial Reinsurance Office, Ld.* (20); Austin's Jurisprudence, 4th ed., vol. 1, pp. 220 n, 221 n; Bankruptcy Act, 1914, ss. 18, 38, 55, 56, sub-s. 2; 97, 98, 105, 167; Bankruptcy Rules, 1915, rr. 10, 26.

LORD STERNDALE M.R. I think this appeal must be allowed. I have very grave doubts whether in any case the order as it now stands could possibly be supported, because there has been a misunderstanding, I think probably due to misapprehension of the facts on the part of the learned judge, so far as I can see, with regard to the question of jurisdiction.

This matter arises in the bankruptcy of a gentleman of the name of Scranton, which bankruptcy is proceeding in the Manchester County Court. This action and four others—there were five altogether—all arising on the same description of claim—were brought by the respective trustees and were assigned under the provisions of the Bankruptcy Act, 1914, and Rules to Astbury J. for trial as being one of the

(1) [1922] 1 A. C. 1.
(2) L. R. 9 Ch. 609.
(3) [1916] 2 K. B. 497, 503.
(4) (1866) L. R. 1 H. L. 129.
(5) [1907] 1 K. B. 865, 870.
(6) [1907] 1 K. B. 875.
(7) (1909) 101 L. T. 25, 503.
(8) [1919] 2 K. B. 735.
(9) (1844) 5 Q. B. 965, 981, 982.
(10) (1878) 4 Q. B. D. 208.
(11) (1890) 25 Q. B. D. 262, 269.
(12) [1901] 2 Ch. 721, 725, 729, 737.
(13) 53 L. T. 492, 494.
(14) L. R. 9 Ch. 432.
(15) 16 Q. B. D. 308, 311.
(16) [1914] 2 K. B. 689, 692.
(17) [1919] 2 K. B. 256.
(18) [1921] 2 K. B. 835.
(19) (1901) 85 L. T. 394.
(20) Ante, p. 67.

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bankruptcy judges. In trying those assigned actions in that way, he would have the jurisdiction, and only the jurisdiction, of an ordinary judge of the High Court trying an ordinary action; that is to say, he would have the right to give judgment for the plaintiff or for the defendant, and on certain grounds no doubt he would have a right to stay the action, but he would not as a judge simply trying the action, in my opinion, have the jurisdiction to consider this doctrine with which we have to deal in this case; and I think the learned judge himself felt that difficulty, because it appears to have been his suggestion that a motion either to stay the action or to restrain the trustee from proceeding with it should be entered in the bankruptcy which he could deal with as the judge administering the affairs in bankruptcy. The action, I may say, had been brought with the consent and by the authority of the committee of inspection, and the trustee was anxious to proceed with it. That motion having been entered in the wrong place because it ought to have been entered, if anywhere, in the Manchester County Court, being a matter in the administration of a bankruptcy with which the learned judge had nothing to do—it having been entered in the High Court, the learned judge then heard it and the action together and made an order which is entitled "In Bankruptcy," but is further entitled in the action and I think contains at the head of it the index number of the action which shows when the writ was issued, so making the order a sort of combined order in the bankruptcy and in the action. The order proceeds: "Whereas the above-mentioned action came on for hearing on the 2nd day of March, 1922, and on the further hearing on the 24th day of March, 1922, leave was obtained by the consent of the parties from this Court to serve notice of motion in the above action"—the notice of motion, it seems to me, would not be in the action, but in the bankruptcy administration apart from the action; certainly I do not see how the notice of motion could have been served in the action—"to stay the said action which had been transferred from the King's Bench Division of the High Court of Justice to this division by order

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of the Lord Chancellor, dated the 16th day of November, 1921. Now upon hearing counsel" and so on "It is ordered that all further proceedings in the above-mentioned action be and the same are hereby stayed with costs." Then there is a further provision as to the costs of the action. It seems to me that this order was made under a misapprehension, which probably arose from the fact that the learned judge did not know that the bankruptcy was proceeding in the Manchester County Court, and, so far as I can gather, none of the learned counsel knew either. There were five actions, some of them in the county court and some in the High Court, and no one knew that this action was not in the High Court, and that is what led to the mistake. I doubt very much if that order could have stood for that reason in any case, but I do not propose to decide the matter on that ground, and for this reason, that the point on the merits, if I may call it so, is a point of great and far-reaching importance, and I think that as it has been argued both before the learned judge and before us, we ought to give our opinion upon it, and also because if we were to determine the appeal upon the technical ground that I have mentioned, it would only lead to further proceedings and further expense, and the same result of coming to this Court again, because it would, I suppose, mean that a notice of motion would at once be entered in the Manchester County Court and the judge there would consider himself bound by Astbury J.'s opinion, and the case would then go to the Divisional Court and so would arrive here again. Therefore to determine it on the narrow point I have mentioned would mean merely extra expense and trouble and inconvenience to everybody concerned.

Having said so much about the preliminary point, I now proceed to the important and substantial point that we have to decide, and it is this. The action is brought by the trustee, founded upon the Gaming Act, 1835, to recover moneys which have been paid to the defendant, by the bankrupt, by means of cheques in discharge of betting debts, and after the decision of the House of Lords in *Sutters* v. *Briggs* (1), that action

[(1) [1922] 1 A. C. 1.

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is an undefended action. It was admitted to be so at the trial before Astbury J., but it was said, and this was the effect of the learned judge's judgment, that although it was an undefended action and although the debt due from the defendant was a chose in action which vested in the trustee in bankruptcy as part of the assets of the bankrupt, yet the trustee ought not to be allowed to proceed with it because the case fell within the doctrine of *Ex parte James* (1), and other cases which have proceeded upon the principle there laid down. Putting it shortly that doctrine is that a trustee in bankruptcy being an officer of the Court, ought not to be allowed to do anything which it would be dishonourable or unconscionable for an ordinary person to do, and that the Court will restrain him from doing it; and it was said that for the bankrupt, if he had remained solvent, to have brought such an action as the present against the defendant would have been a thing which any right-minded man would have considered reprehensible. It is said (and I am using expressions which have been used in the cases, although they are not technical terms of law) that it would have been shabby—would have been a dirty trick—would have been a thing that anybody ought to be ashamed of; and that being so, the Court would consider it a shabby thing, or a dirty trick, or a thing to be ashamed of on the part of the trustee if he were to proceed with the action. I can only say that I am by no means convinced myself that the matter can be solved by saying that, had the bankrupt remained solvent, to bring such an action as this would have been on his part a disreputable thing, or any of the other expressions which have been used, and, therefore, it follows necessarily that it must be the same on the part of the trustee to do it. It has been said in some of the cases that the trustee, being an officer of the Court, is bound at least to adopt as high, and it may be a higher, standard of morality in the matter than the bankrupt himself if he had remained solvent, but I think it has also to be considered that the trustee stands in a different position from the bankrupt if he had remained

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solvent. If the latter had remained solvent, he would have been seeking to recover money which he had paid as a debt of honour, in order to put it back into his own pocket. The trustee, on the other hand, is bound as a trustee to administer the bankrupt's estate for the benefit of the bankrupt's creditors in general, and I am by no means sure that the same standard is to be applied to him, so that if it be said it would be a dishonourable thing on the part of the bankrupt if he had remained solvent to bring the action, therefore it must be a dishonourable thing on the part of the trustee. I think there is a great difference between the present case and any of the other cases in which the doctrine has been applied. As I pointed out there was here an unquestioned right in the trustee to recover this money from the defendant both at the time the receiving order was made and at the time the adjudication was made. That right was a chose in action which was part of the property of the bankrupt. By the express provisions of the Bankruptcy Act, 1914, that chose in action is vested in the trustee, and, therefore, what he is doing is realizing an asset which comes to him as a statutory debt and is vested in him expressly by statute as such, and it comes to him as a statutory debt under the provisions of an Act which provides that in the circumstances of the payment in this case "such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid"—that refers to the previous section of the Act by which cheques such as this are declared to have been given for an illegal consideration—"and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of His Majesty's Courts of record."

Looking at *Ex parte James* (1), which is the case which established this doctrine, it will be seen that the circumstances were very different. In that case the trustee had

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received money of which he ought not to have received payment, and which by no right could be called his money or the money of the bankrupt, but which if he had been a private individual, although it could not have been contended that it was his money, there would have been a technical difficulty in recovering from him, because it had been voluntarily paid under a mistake of law. The difference is that there the trustee was seeking to enlarge the assets of the bankruptcy by money that even he himself would have had to admit was not his money and never vested in him at all, but was simply money which could not be recovered from him in consequence of some technical rule of judge-made law. It is not the difference between a statutory debt and any other debt; it is the difference between money which was never rightly the trustee's at all and which would not have been rightfully the property of an individual under the same circumstances, and money which could not have been recovered from an individual because of this technical rule as to voluntary payment. In that case the Court said that the trustee should not be allowed to set up such a technical objection to doing right; he had got another person's money and must give it back again. The same was the case with regard to the next case, *Ex parte Simmonds* (1), that followed. There is another class of case, where there was an asset which vested in the trustee and was an asset in the bankruptcy—namely, a policy, but an asset which would have come to an end and ceased to have any value at all or to be an asset but for the fact that it was kept alive to the knowledge of the trustee through the payments of the premiums by a person who was under the impression that she would get the benefit of the policy. There again the trustee was seeking to increase the assets of the bankrupt's estate by something that would have had no value at all if another person had not been allowed by the trustee to keep it alive under a wrong impression: see *In re Tyler*. (2) That again is a totally different case. There were two cases of that kind; I am not going through them

(1) 16 Q. B. D. 308. (2) [1907] 1 K. B. 865.

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in any detail because they have been discussed quite fully in argument; and in other cases in which the same thing had happened, but the payments had been made without the knowledge of the trustee, the trustee was held to be entitled to take the benefit of the policy which had been kept alive without repaying the premiums which had been paid: see *In re Stokes*. (1)

If the doctrine were to be extended to the length which is contended for in this case, I can hardly suppose that in those cases the trustee would have been held entitled to retain the policy money, but he was so held.

The last case to which I think it necessary to refer is *In re Thellusson*. (2) It is difficult to bring that case within either of the classes I have mentioned, and I think it was an extension of the doctrine, but it was an extension which stopped very far short of the degree to which the respondent contends the doctrine should be extended in this case. That was a case where the bankrupt had obtained a loan which or a portion of which he had paid into his bank, under circumstances which certainly would have made it extraordinarily dishonourable for him to attempt to retain the money, and the trustee was also in that case held not to be entitled to retain the money because it was said he ought not to take advantage of the dishonourable conduct of the bankrupt. That decision may possibly be explicable on the ground suggested by Mr. Clayton —namely, that it was a case of the trustee having to elect whether he should take advantage of the act of the bankrupt acting as his agent. If it can be explained in that way I do not think it goes any further than any of the other cases, because then it would simply amount to this: that where something has been done by the bankrupt of which the trustee can take advantage, but he is not bound to do so, the Court will, if the act is a dishonourable act, say: "You as officer of the Court ought not to take advantage of the act and so increase the assets of the bankruptcy." The case may possibly be explicable on that ground, but I do not think that the learned judges who gave judgment in it intended to base their decision

(1) [1919] 2 K. B. 256. (2) [1919] 2 K. B. 735.

on so narrow a ground. I think they did intend to extend the doctrine of *Ex parte James* (1) further than it had gone before, at any rate to facts to which it had not been before applied, and that the decision does go further than the other cases, but it stops, as I have said, very far short of what is contended for in this case. In my opinion, if what Astbury J. did here was right, it amounts to repealing the statute in the case of trustees in bankruptcy, and to saying that the provision in the statute is to be read as if it were : " shall be deemed to be taken to be a debt due and owing from such last named person to the person who shall have paid such money, and shall be recoverable by action at law in any of His Majesty's Courts of record unless the person who sues for it happens to be a trustee in bankruptcy or other officer of the Court " ; and that would to my mind be to legislate by repealing the Act, or, if not to repeal the Act, to insert into it a clause which is not there.

It was argued perfectly rightly before us that we must look at what is the object of this Act and how it came to be passed. When I say " perfectly rightly " I do not mean to say I agree with the conclusion, but I mean that we must look to see how it came to be passed and we must look at this provision, with the result which must now be attached to it, that it was probably left in the Act by accident, and that nobody for nearly a hundred years awoke to the fact that it had the construction which is now attached to it. The learned judge seems to have assented to that argument, because he said he must look at the statute and see whether it formed part of the public policy of the realm, and if it did not then he might apply the doctrine of *Ex parte James* (1) to an action founded upon it, but that if it did form part of the public policy of the realm then he could not apply the doctrine. I am bound to say I think that it is an extraordinarily dangerous and mischievous doctrine to hold that a Court, in considering whether it can give effect to an Act of Parliament or not, is to examine the Act and see whether it considers it is the kind of legislation which is consistent with the general policy of the

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realm. Such an attitude does not perhaps strike one as very startling in this case, but, if it is to be adopted at all, it seems to me that it is one which might lead to extraordinary results. In my opinion all this Court can do is to say: Is that what is enacted by the statute? and, if it is, it must give effect to it; and I think on that point what Lord Sumner said in *Sutters* v. *Briggs* (1) is of some importance. He says this: "The general policy of the Act of 1835 is finally appealed to"—that I think must be some such argument as that which I have been mentioning—"I think, if this point is distinguishable from the argument upon the words of the preamble, it really involves an inquiry whether this was a sensible piece of legislation or not, which is hardly a judicial question." I entirely agree with that. All that this Court can do is to look at the Act and ascertain to the best of its ability what it provides, and having done so to obey it and give effect to it, and it ought not to consider whether, in its opinion, the legislation is consistent with the general trend of opinion in the country. I can conceive some very remarkable results that might follow if the Court were to lend itself to such a method of dealing with the statute.

For these reasons I think that the doctrine in *Ex parte James* (2) does not apply to this case. We are bound by the decisions but not by all the dicta of all the judges who have given judgment in these cases that have followed *Ex parte James* (2), and certainly we are not bound by the dicta apart from the particular facts of the case in which those dicta were uttered. It is always a most dangerous thing to take a somewhat wide expression of a learned judge and separate it altogether from its context and the facts of the case and say: "Now that is something which has to be followed in every other case." The learned judge, in ninety-nine cases out of a hundred, never meant anything of the kind. I see nothing in any of these cases which obliges us to hold that where there is an undoubted right of action given by a statute which provides that a certain sum of money may be recovered as being paid for an illegal consideration, and

(1) [1922] 1 A. C. 1, 25. (2) L. R. 9 Ch. 609.

therefore a debt recoverable, and where that chose in action so constituted is by the express terms of the Bankruptcy Act made part of the assets which vest in the trustee, there is anything dishonourable or improper or unconscionable or shabby or dirty (or any of the other expressions that the learned judges have used) in the trustee enforcing the debt, in order to collect the asset and distribute it amongst the creditors who are his cestuis que trust. As I have said I do not think that his position is in all respects, when you come to consider whether his act is honourable or not, the same as that of the bankrupt if he had remained solvent and had brought the action himself for his own benefit.

For these reasons, I think the appeal must be allowed, and the result will be that there must be judgment given in the action, with costs, for the sum claimed by the plaintiff, because it was admitted there was no defence to the action if the trustee had the right to go on with it, and the trustee has apparently such a right.

WARRINGTON L.J. I am of the same opinion. With all respect to the learned judge I think his judgment is incapable of being supported. The action in which the judgment was pronounced was an action brought by the trustee of a bankrupt to recover moneys paid to the defendant upon a bankrupt's cheques given in satisfaction of betting debts. Now, by the Gaming Act of 1835, moneys so paid are to be deemed and taken to have been paid upon an illegal consideration, and are deemed and taken to be debts due and owing from the person who received them to the person who shall have so paid such money and shall accordingly be recoverable by action at law in any of His Majesty's Courts of record. The trustee in bankruptcy brought this action to recover a sum of money which is by statute declared to have been paid upon an illegal consideration and to be a debt due and owing from him to the defendant. Such a debt is a chose in action and part of the property of the bankrupt, and, by s. 18 of the Bankruptcy Act, 1914, this item of property with all other items of property of the

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bankrupt, became vested in the trustee and divisible among his creditors. It was the trustee's duty to realize the property divisible among his creditors, and, in exercise of that duty and in the interests of the creditors, he brought the action which the statute gave him a right to bring. The learned judge before whom the action was tried has made an order staying all proceedings in the action. That is preventing the trustee from recovering this item of property vested in him. It is admitted that as the judge trying the action, he had no jurisdiction whatever to stay the proceedings in an action founded on a legal cause of action to which there was no defence; but it was said that the Court, acting in bankruptcy, where it is administering the assets of a bankrupt through its officer, the trustee, has, in certain cases, ordered the trustee to do something which, by law, he was not compellable to do, or to abstain from doing something which, by law, he ought to do, on the ground that the Court, acting by its officers, should do and would only do that which an honest man acting with the desire to do real justice would do or abstain from doing. But the jurisdiction to give any such instructions to a trustee in bankruptcy is a jurisdiction which can only be exercised in bankruptcy, and, therefore, the learned judge, desiring to exercise that jurisdiction in the present case, gave leave to the defendant in the action to give a notice of motion before himself sitting as a judge in bankruptcy to deal with the matter, on the lines of the principles to which I have referred; but unfortunately the judge was not the judge in bankruptcy and had no jurisdiction in bankruptcy over this case. The bankruptcy was being conducted in the county court of Manchester and the learned judge, therefore, had no jurisdiction in bankruptcy at all: it was a very unfortunate mistake. Nobody seems to have realized that in this particular case, which was one of several raising the same point, the bankruptcy was not a London bankruptcy and therefore was not within the jurisdiction of the learned judge. It was for that reason that the mistake was made, but it was a mistake, and, the judge having no jurisdiction to put into force the principle which was invoked

in justification of his judgment, that would of itself render the order he made of no effect. But, like my Lord, I do not propose to dispose of the case on that ground. The case has been made a test case, and I think it is desirable that we should say something about the merits on which the judgment was founded. With regard to that, what is relied upon is the fact that in certain cases, as I have said, the Court has, acting in administration through its officer required that officer to pursue a course of conduct the reverse of which the Court would consider dishonourable or a shabby trick, to use some of the many expressions which have been used, although the course in question was not one which the trustee could by law be compelled to take. In my opinion the learned judge has adopted that principle or rather done the same thing in a case, the facts of which are entirely different from the facts of those cases in which that has been previously done. When the cases are examined this will be found. The first one was *Ex parte James* (1) before James and Mellish L.JJ. That was a case in which the trustee had in his hands money which did not belong to him by law and to which he had no right, and the Court said: "Pay that money to the man to whom it really belongs and to whom it by law belongs," and the only answer which the trustee could give was: "Oh, but I am entitled by law to keep it although it does not belong to me. It came to me, it is true by mistake, but the mistake was one of law." The reply was: "It is perfectly true that an individual who is not under the control of the Court, may retain moneys which do not belong to him because he has a technical legal right so to do, but it is not an honest or an honourable thing to do and we will not let you, as our officer, take that course." That is all that case was. There were one or two other cases of the same kind depending on that statement of the law. Then came a case of a different kind. There a bankrupt was possessed of a policy of insurance on his life. It was then worth nothing, but of course vested in the trustee, with the rest of his property. The debtor's wife during

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a considerable number of years which elapsed between the bankruptcy and the death of the assured, the bankrupt, had paid the premiums on the policy and the interest due to the bankers who were the mortgagees of the policy. The wife, therefore, had by her payments made that item of property, which was of no value at the date of the bankruptcy, of great value, because when the assured, the bankrupt, died, that money became payable, by law, to the trustee. Now those premiums and the interest on the mortgage, had been paid by the wife, with the knowledge of the trustee in bankruptcy for the time being, and what the Court there said was: "It would not be honest for anybody, although he might have a legal right to do so, to insist on keeping the proceeds of the policy without making good to the person who had paid the premiums and interest the money without payment of which the policy would have been worthless." That was the whole of that case.

Then there was a third case. That was *In re Thellusson* (1), and I am inclined to think that there the Court went a step further, but a step immeasurably short of that which the learned judge has taken in the present case. In that case, what happened was, that the receiving order having been made on January 2, after the commencement of the bankruptcy, a friend of the bankrupt had paid into his bank by way of loan a sum of about 900*l.*, and he had done so really as the result of the bankrupt's fraud. The bankrupt knew that a bankruptcy notice had been issued against him. He knew that the day before the money was paid into the bank, the petition in bankruptcy was to come on for hearing; he did not actually know as a fact that the receiving order was made, but if he had thought for a moment he must have known that inasmuch as he did not appear upon the petition, the receiving order would be made, as there was no answer to the petition. The lender knew none of these facts and thought that what he was doing was lending his friend a sum of money which would enable him to pay off a single pressing

(1) [1919] 2 K. B. 735.

creditor. The debtor became bankrupt. The trustee, as he was legally entitled to do, obtained the money from the bank, but the Court directed him to repay it. The ground on which that decision was based was I think this, that it was not right or honest that that trustee should take advantage of the wrongdoing of the bankrupt as a consequence of which he, the trustee, had become possessed of this money, and the decision may I think be justified on the doctrine now well established, that in the case of property acquired after the commencement of the bankruptcy, as this was, the bankrupt, in reference to it may be treated as the agent of the trustee. I agree that the decision was not put on that ground. As I have said I think that is a case which went a little further than the other cases but not nearly so far as it is sought to go in this case. Now what is this case? Here the trustee is entitled to a statutory debt. He has to collect that debt—not for the bankrupt himself who paid the money, but for the bankrupt's creditors, and it seems to me that even if there would be something dishonourable on the part of the bankrupt in seeking to recover money which he had voluntarily paid in discharge of cheques given for betting transactions, it by no means follows that it would be dishonourable or dishonest for the trustee to take similar proceedings in order to create a fund for payment, let us say, of the butcher or the baker, or other persons who had supplied goods to the bankrupt. It seems to me there might well be a difference between the two cases. But putting that aside, the law of this land vests in the trustee the right to recover that debt, and provides that that debt with other items of property, shall be divisible among the creditors, and in my judgment the Court has no right, on the footing that the trustee is its officer, to say that that particular item of property shall not be got in. By statute it belongs to the trustee, and the trustee is entitled to recover it. But it is said: "Oh, but that statute is 80 years old, and no one quite knows why that provision was allowed to remain when other parts of the statute were repealed. For many years it was not acted upon, and

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it was not until some ingenious person dug it out and got first the Court of Appeal in *Dey* v. *Mayo* (1) and then the House of Lords, in *Sutters* v. *Briggs* (2), to decide that there was this cause of action, that anybody thought anything at all about it." All I can say is, if we are to decide cases depending on statute on any such footing as that, we are, as judges, not administering the law but administering that which has been vaguely referred to as the general policy of this country. That is not what we are here for. We are here to administer the law as it stands. It is the Legislature which has to do with the policy of the country, and not the judges, who administer the law. Therefore in this case where, as I have said, the trustee is only exercising a right which is vested in him by statute, a right which he is entitled to exercise, and I think I may go further and say he is bound to exercise for the benefit of the creditors amongst whom the property is divisible, it would be wrong to interfere with that right by prohibiting the trustee from bringing the action which he is entitled to bring.

In my opinion, the order of the learned judge should be discharged, and there must be judgment in the action for the trustee for the agreed amount, with costs.

YOUNGER L.J. I am of the same opinion. Nothing in the arguments which we have heard on this appeal has led me to modify or alter the view I have always taken, that the principle laid down in *Ex parte James* (3) is one which properly applied is of extreme value in the administration by the Court of its bankruptcy jurisdiction, and I think, as I have stated in another case, that the Legislature has shown its sense of the utility of that principle properly applied by the fact that although the claim on the part of the Court to apply it has been notorious since the decision in *Ex parte James* (3) no subsequent Bankruptcy Act contains any provision restricting or qualifying the powers of the Court in that behalf. On the other hand, the arguments which have

(1) [1920] 2 K. B. 346. (2) [1922] 1 A. C. 1.
(3) L. R. 9 Ch. 609.

been presented to us in this case and the judgment itself of the learned judge, have served I think to demonstrate that if the principle in *Ex parte James* (1) be not applied with very great caution and in clear cases only, there is a real danger that the whole practice may ultimately suffer shipwreck, and a great misfortune, I think that would be.

But I have arrived at the conclusion that this is not a case in which it is open to the Court to apply this principle at all. I am free to agree that the Act of Parliament, of which the trustee in the present case refuses, if he be allowed, to take advantage, is, in relation to the rest of the statute law on this vexed subject of gambling, anomalous and partial in its operation. I can discover no obvious reason why bets which have been paid by a cheque should be recoverable as debts paid upon an illegal consideration while bets which have been paid in cash should not be recoverable at all. I do not doubt that the statute, as it stands, is a survival, very probably, perhaps even certainly, an accidental survival. But although the anomalous character of the statute has been proclaimed by reluctant judicial decision for at least three years, and although its true effect was declared by the House of Lords itself during last year, the statute still remains unrepealed and unamended. It appears to me therefore that, so far as this and every other Court is concerned, it must be taken to embody the law of the land with a force as binding as that of any other statutory enactment, the effect of which has been declared with equal authority, and I may add, notoriety. As the Lord Chancellor said in the case of *Sutters* v. *Briggs* (2), where the effect of the statute was laid down: "Where, as here, the legal issues are not open to serious doubt our duty is to express a decision and leave the remedy (if one be resolved upon) to others."

Now I am free to admit that in the case of an individual it would, notwithstanding this statute, probably be regarded universally as dishonourable that he should seek to recover a lost bet which he has paid, whether he has paid it in cash or

(1) L. R. 9 Ch. 609. (2) [1922] 1 A. C. 1, 8.

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whether he has paid it by a cheque, just as I think it would probably be regarded universally as a dishonourable act on his part not to pay a debt of honour if he has any means of paying it. But in relation to such a subject as this, even when you are dealing with the case of an individual, it is not I think possible dogmatically to lay down an obligation of honour universally applicable in all circumstances. You may find even in the case of the individual complications not at all unusual, which in the minds of some people at all events would make the obligation non-existent. I select by way of example two cases of the kind I have in mind, because they are in some degree characteristic of the normal position of a trustee in bankruptcy. I take first the case of an individual who has indulged in betting, having both won and lost, and I ask myself the question, whether it is quite certain in the case of such an one that if he were confronted with actions by others with whom he had made bets, to recover moneys which he had won and which had been paid to him by cheque, it would necessarily be dishonourable for him, seeking to avoid ruin—it may be not only for himself but for his dependants also—himself to take advantage of this statute for the purpose of recovering from those to whom he has paid lost bets by cheque the moneys which he has so paid. I think there may be at least room for doubt in such a case as that; I express no opinion one way or the other upon it. I will take another case perhaps more difficult. It is the case of one heavily indebted to persons likely to be ruined if he does not meet his obligations towards them. If such an one has, according to the statute of 1835, owing to him as money due upon an illegal consideration sums in respect of lost bets which he has paid by cheque, is it necessarily dishonourable on his part to seek to recover these debts from the persons who, by statute, owe them to him, in order that thereby he may discharge those legal obligations to others, which if not discharged will involve these others in ruin? May it not be that it is a higher honour for him to risk dishonour in suing for these debts, that he may thereby discharge these other responsibilities?

I do not know, but it seems to me that in these matters you get at once into the region referred to by Salter J. in his judgment in *In re Wigzell* (1) where he said that "questions of ethical propriety have always been, and will always be, the subject of honest difference among honest men." Now these two illustrations I have chosen because they are not without analogy to the position of a trustee in bankruptcy in relation to a matter of this kind. What is the position of a trustee in bankruptcy? He is not seeking to recover these bets for his own advantage; he is seeking to recover them for the advantage of the creditors in the bankruptcy. He is powerless to prevent the assets available for those creditors from being depleted by claims made upon them by persons who have made payment of bets to the bankrupt by cheque. Is it to be said to be dishonourable that he should seek to recoup, if he can, the bankrupt's assets so depleted by, in turn, seeking to recover from those who are liable for them as moneys paid by the bankrupt for an illegal consideration lost bets paid by cheque? I am quite unable to say whether or not it would be a dirty trick on the part of the trustee in such a case to do such a thing. I am not prepared to say that, acting in the interest of the creditors of the bankruptcy, it would even be dishonourable for him to do so. It is extremely doubtful, as it seems to me, whether either epithet could be applied to the action of the trustee in such a case, if only for this reason, that you must be very sure that it is the honour, whether of the trustee or the Court or of any one else, that is really being compromised before you can be justified in vindicating it at other people's expense. Accordingly, here we start with this preliminary difficulty that, at least as it appears to me, this is not one of those perfectly plain and clear cases in which alone, as I think, the authorities show that this principle may be applied by the Court. But I am not sure that it is necessary, for the purpose of disposing of this appeal, to rest my judgment on such considerations as these. We have here a right in the trustee which has been declared existent by Act of Parliament, partial and anomalous though that Act may be. We find

(1) [1921] 2 K. B. 835, 845.

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that the trustee in bankruptcy and his committee of inspection are desirous that that legal right of the trustee shall be enforced—the right given to him by Act of Parliament. We find that there is not open to the defendant in respect of the claim which is made against him any kind of equity, or any special circumstance of aggravation which would make his position, in reference to the claim, one in respect to which any favour might be fairly conceded to him. The question for this Court then is, whether we have here a case in which there is any room at all for the application of the doctrine which has been invoked? If to such a case as this the doctrine is to be extended, as I think the learned judge has extended it, merely because no special circumstance exists to prevent its exercise, there would in another case be a grave danger that the Court would be led into conflict with the Legislature itself and the result of such a conflict might well be that this valuable principle—extremely valuable in my view when properly applied—would be at risk of being swept away altogether. I am not prepared, speaking for myself, to be a party to putting the principle in such a position of peril. I think it would be placed in that position if it were stressed to the point to which the learned judge has carried it in this case.

In my opinion, therefore, agreeing with my Lord and the Lord Justice, I think this appeal should be allowed.

Appeal allowed.

Solicitors: *Woolfe & Woolfe; John J. Hands.*

W. I. C.

CONSETT INDUSTRIAL AND PROVIDENT SOCIETY, LIMITED *v.* CONSETT IRON COMPANY, LIMITED.

C. A. 1921

PETERSON J. *Feb.* 15-17, 22-25; *March* 1-3, 8-11, 14-16; *April* 22.

C. A. 1921 *Dec.* 2, 5-9, 12, 13.

1922 *April* 10.

[1916. C. 2661.]

Inclosure Act—Construction—Reservation of Manorial Rights—Provision for Compensation—Right to Support of Surface—Subsidence—System of Working—Commercial Practicability—Injunction—Lanchester Inclosure Act, 1773 (13 *Geo.* 3, *c. lxvii.*)—*Appeal—Previous Decision of Court of Appeal on same Act—Grounds of Decision disapproved of by House of Lords in subsequent Case but Decision not overruled—Decision binding on Court of Appeal.*

By the Lanchester Inclosure Act, 1773, the moors and commons of the manor of Lanchester, Durham, were divided and allotted. The Act provided that the lord of the manor and his assigns should have, hold and enjoy all mines and minerals within and under the allotments, with full and free liberty of searching for, draining, winning and working the mines and minerals by any ways or means then in use or thereafter to be invented as fully and freely as he might or could have had, held, used and enjoyed the same in case that Act had not been made without paying any damages or making any satisfaction for so doing; and also that the annual rental of a certain allotment to the Justices should be applied in or towards the compensation of those allottees whose allotments were damnified by the exercise of the lord's mining rights, and that any deficiency should be made up by means of a rate levied upon all the allottees:—

Held by Peterson J. in granting an injunction against the defendants who were lessees of the mines and had caused subsidence of the plaintiffs' land,

(1.) That the reasoning of the members of the Court of Appeal who, in *Consett Waterworks Co.* v. *Ritson* (1889) 22 Q. B. D. 318, 702, post, p. 187n., decided, upon the construction of the same Inclosure Act, that the lord and his assigns were entitled to work the mines in such a way as to cause subsidence, could not be reconciled with the views expressed by the House of Lords in *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* [1906] A. C. 305, and that having regard to the rules of construction which had been laid down by the House of Lords in that case and in *Love* v. *Bell* (1884) 9 App. Cas. 286, the lord was not, under this Act, entitled to let down the surface of the allotments.

(2.) That in 1773, and also at the present time, it was commercially practicable to work the mines without letting down the surface, and

(3.) That at the date of the Act the established practice of mining in this particular district was not such that the inevitable consequence of employing it was subsidence.

Held by the Court of Appeal (reversing the decision of Peterson J.) that the case was governed by the decision of the Court of Appeal in *Consett Waterworks Co.* v. *Ritson* (supra), which was a decision on the

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identical question arising on the construction of the same Act and in the same circumstances, and that although the reasoning upon which that decision was founded had been disapproved of by the House of Lords in *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (supra), the decision itself had not been overruled and was therefore binding upon the Court.

Held, therefore, that the defendants had a right to work the mines so as to let down the surface of the land without paying damages or making any compensation to the plaintiffs.

Held also by Younger L.J. that the decision at which the Court of Appeal had felt itself compelled to arrive in deference to authority binding upon it might quite well have been reached on the construction of the Act itself apart altogether from the decision by which it was bound.

Per Warrington L.J.: In order that a case may be treated as overruled one must find either a decision of a superior Court inconsistent with that arrived at in the case in question, or an expression of opinion on the part of that Court as a whole that the case was wrongly decided on its own facts, and not merely that it ought not to be treated as an authority in a case arising out of different facts.

THE plaintiffs were the owners in fee simple of an estate known as the Bunker Hill Estate in the parish and manor of Lanchester in the county of Durham, which formed part of the moors and commons allotted and divided by the Lanchester Inclosure Act, 1773 (13 Geo. 3, c. lxvii.), by which Act it was provided that the Lord Bishop of Durham, as Lord of the manor of Lanchester, his successors, lessees and assigns should have and hold work and enjoy all mines, minerals and quarries under the moors and commons intended to be thereby divided and allotted with full and free liberty to search for win and work the same by any means then in use or thereafter to be invented as fully and freely as theretofore without paying any damages or making any satisfaction for so doing.

The defendants were lessees of certain mines of coal, ironstone and fireclay, under (amongst other lands) the plaintiffs' lands, under an indenture of lease dated July 24, 1884, granted to them by the Ecclesiastical Commissioners for England, the successors in title of the Lord Bishop of Durham, and had, as the plaintiffs alleged, so worked the mines as to cause serious subsidence to the Bunker Hill Estate, thereby depreciating its agricultural value and also,

which was of much greater importance, its value as a building estate.

The plaintiffs claimed in this action a declaration that the defendants were not entitled to work in such a manner as to let down the surface of the Bunker Hill Estate; an injunction and damages.

The defendants denied subsidence and damage and claimed that their lessors and they had power to work the mines so as to let down the surface, and that the methods of working coal mines in use in the district at the time of the passing of the Inclosure Act and those invented and used thereafter were and were then known to be such as of necessity to cause subsidences of the surface.

The following further statement of the facts and of the material sections of the Inclosure Act is taken from Peterson J.'s considered judgment:—

"The question in this action is whether the defendants are, as they claim to be, entitled to work their mines under the plaintiffs' lands in such a way as to let down the surface. For the purposes of the trial, the defendants' counsel admitted that their mining operations had caused some subsidence, so that if the plaintiffs' contention that the defendants were not entitled to let down the surface were held to be correct the claim for an enquiry as to damages would succeed.

"The plaintiffs are the owners of part of Lanchester Moor in the County of Durham, which was allotted to their predecessors in title under the provisions of the Lanchester Inclosure Act, 1773. This land is known as the Bunker Hill Estate, which is at present cultivated as a farm and is alleged to have considerable value as a building estate. The manor of Lanchester in 1773, as appears from the recitals in the Act of 1773, comprised various moors, commons or tracts of waste land, which were estimated to contain about 20,000 acres. The lord of the manor was the Bishop of Durham. The lord was entitled to work the mines under the wastes, subject only to the obligation to leave sufficient pasturage for the commoners. He was also entitled by the custom of

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the manor to work the mines under the copyhold tenements without the consent of the copyholders, provided that he did not let down the surface. His right then before the Act was to let down the surface of the waste so long as a sufficiency of pasturage was provided for the commoners, but he was not entitled to let down the surface of the copyhold without the consent of the copyholders.

"The Act of 1773, after reciting that considerable parts of the commons or wastes were capable of 'cultivation and improvements,' by s. 1 directed that they should be divided, set out and allotted by Commissioners 'unto and amongst or for the benefit of the several persons having rights of common thereon.' By s. 19 the Commissioners were directed to set off, ascertain and appoint such parts of the commons as appeared to be 'little capable of cultivation and improvement' but so that the residue to be divided allotted and enclosed should not be less than 12,000 acres, and then to set out and appoint in, over, upon, and through the residue or more improvable parts, a public highway and roads, common quarries, common watering places for cattle, and common wells, and shall also assign and set out such common, public and private horse and other roads, ways, passages and bridges, and such gates, stiles, hedges, sewers, drains and watercourses in over upon and through the lands to be enclosed as they should think proper. The section then provided for the allotment of the residue of the more improvable parts of the common. Thirty acres were to be allotted to the Curate of Satley. From 300 to 500 acres were to be allotted to the Justices of the Peace for the County, and the residue, after providing for expenses and some other purpose mentioned in the section, was to be allotted amongst the Bishop and the commoners in the proportion to the values of their respective tenements to which the right of common belonged. Then under s. 23 the allottees, other than the Justices of the Peace and the Curate of Satley, were to pay to the Bishop 4*d*. per acre each year. Under s. 24, each allotment was to be held in the same manner and to be of the same nature and tenure as the tenement in right of or for

which it was allotted. Sect. 30 provided that an allotment in respect of a copyhold or customary tenement should be added to that tenement and be subject to the customs to which the tenement was subject. Sect. 36 extinguished all rights of common upon the more improvable parts of the common which were divided, allotted and inclosed, and upon any portion of the less improvable parts of the commons which should be allotted, accepted, and inclosed under s. 50. Sect. 44 extinguished all the lord's rights to trees and underwood in the lands allotted in respect of copyhold or customary tenements.

"Sects. 45, 48 and 49 are the sections on which the defendants rely as shewing that the lord was to be at liberty to work the mines under the lands allotted in any way he thought fit notwithstanding that the result of his operations might be to let down the surface. By s. 45 it was enacted, after providing for the royalties and the manorial rights of the Bishop as lord of the manor, that the Lord Bishop of Durham and his successors and his or their lessees and assigns 'shall and may from time to time and at all times for ever hereafter hold and enjoy all courts, perquisites and profits of courts, rents, services, waifs, estrays, and all royalties, jurisdictions, matters, and things whatsoever to the said manor or to the lord thereof for the time being incident, belonging, or appertaining, other than and except such common right as could or might be claimed by him or them as owner or owners of the soil and inheritance of the said moors or commons, in as full, ample, and beneficial a manner, to all intents or purposes, as he or they could or might have held or enjoyed the same if this Act had not been made; and also that the said Lord Bishop of Durham and his successors, and his and their lessee and lessees and assigns shall and may from time to time and at all times hereafter have, hold, work, and enjoy all mines, minerals, and quarries, of what nature or kind soever, lying and being within or under the said moors or commons intended to be divided and allotted as aforesaid, together with all convenient and necessary ways and wayleaves, in, through, over and along the

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said moors or commons, or any part thereof, not only before but also at all times after the same shall be divided, in pursuance and by virtue of this Act, and full and free liberty at all times hereafter of making, laying, repairing, and using any new road or roads, waggonway or waggonways, or any other way or ways whatsoever, in, through, over and along the same or any part thereof, and for that purpose to take away and remove any hedges, fences, trees, partitions, or other obstructions which shall be made for dividing the said moors or commons, or otherwise, or which shall be standing or growing thereon, and to do every other act which shall be necessary to be done for the purposes aforesaid, and of searching for, draining, winning and working the said mines and quarries, and also of all other mines and quarries belonging to the See and Bishopric of Durham, wheresoever the same are or be, by any ways or means now in use, or hereafter to be invented, and also of lading and carrying away all and every the coals, lead, minerals, stones, the manure bred at the said mines, and other things to be gotten thereout, or out of any other lands or grounds whatsoever; and also of leading and carrying all iron, wood, materials, and things unto the said mines and quarries, needful, necessary, or proper for the draining, winning, working, and use of the same respectively, and of making pits, shafts, pit-rooms, heap-rooms, drifts, levels, watercourses, and drains, and of using as heretofore all those buildings, workshops for smiths and wrights, hay-yards and raff-yards, already erected for the purpose of working the coal mines under the said moors or commons, and of erecting and using fire engines and other engines, and other buildings, workshops, hay-yards and raff-yards, pit-rooms, heap-rooms, and all and every other necessary and convenient works, buildings, erections, liberties, powers, and authorities, either now in use or hereafter to be invented, together also with full and free liberty, power, and authority, from time to time, and at all times, at his and their will and pleasure, to remove and take away from off the said moors or commons, and to convert to their own use and uses, all and every the rails, sleepers, iron, timber and other

materials of the said waggonways, and other ways, pits, shafts, fire engines, and other engines, shops, and other works, buildings and erections whatsoever, already laid, placed, built, or erected, or hereafter to be laid, placed, built, or erected as aforesaid, as fully and freely as he or they might or could have had, held, used and enjoyed the same in case this Act had not been made; and that without paying any damages or making any satisfaction for so doing.'

"Sect. 48 is in these terms: 'And whereas great inconvenience may happen, and damage be done to particular persons, by reason of searching for, winning and working the said mines and quarries within and under their respective allotments, not only of the more improvable parts of the said moors or commons, but also of the less improvable parts thereof, after the same may be accepted and inclosed by virtue of this Act as hereinafter is directed and provided, by the said Lord Bishop of Durham and his successors, and his and their lessee and lessees, and assigns, without paying any damages, or making any satisfaction for so doing: For remedy whereof be it enacted, That when and so often as any person or persons shall suffer or sustain any loss or damage in his, her, or their respective allotment or allotments, by the searching for, winning or working of the said mines and quarries therein, or the leading or carrying away the coals, lead, minerals, stones, or other things to be gotten thereout, or out of any other mines or quarries belonging to the said Lord Bishop of Durham and his successors; or by the making, laying, repairing, or using of waggonways and other ways; or by making drifts, levels, or watercourses; or erecting or using fire engines or other engines; or making or using pit-rooms or heap-rooms, or using any other of the powers or liberties hereby reserved to and for the said Lord Bishop and his successors, and his and their lessee and lessees, and assigns as aforesaid; such person or persons so damnified upon making such complaint, shall receive such satisfaction for such damage as hereinafter is directed in that behalf.' Then it provides that the Justices shall hold the lands allotted to them upon trust to demise the lands for any term not

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exceeding 21 years for the best and most approved yearly rent; they to nominate a steward and clerk, and after deducting the salary of those officials and all other necessary charges and expenses attending the execution of the trusts 'from and out of the net or clear rents and profits of the premises, the residue or clear balance thereof shall from time to time, be paid, applied, and disposed of in manner following:'—that is, putting it shortly, to apply the clear rents in making satisfaction to persons injured by working the mines or by any of the other operations authorised, and for damages to be ascertained at the Sessions—'and the residue or overplus (if there be any) of the said rents and profits, after paying and satisfying all such damages and charges so to be ascertained as aforesaid, shall from time to time be paid, applied, disposed of, and laid out in the repairing, amending, and supporting the public and common highways, causeways, and other ways which shall be set out and made upon or through the said moors or commons by virtue of this Act, in such manner and form, and by or under the direction of such person or persons as to the said Justices or the major part of them at any of their said sessions or adjournments, shall from time to time order, direct, and appoint.'

"The remaining s. 49 deals with the possible effect of the rents being insufficient for the purpose of making good the damage which has been sustained. It is in these terms: 'And whereas it may happen in some years, that the clear rents and profits of the said last mentioned allotment or parcel of ground, may not be sufficient to satisfy and pay all the damages and charges which may be so sustained, and so settled, ascertained, and determined by the said Justices as aforesaid: Be it therefore enacted, That in every such case so happening the deficiency, after such application of the said rents and profits as aforesaid, shall be paid and borne by the owners or occupiers of all the several allotments of the said moors or commons (save and except the said allotment so to be vested in the said Justices, but including that or those of the persons so damnified and making complaint),

according to the respective yearly rents or values of the same, as they shall be respectively rated or charged for or towards the relieving of the poor of the several parishes, townships, or places wherein they shall respectively lie, in such shares and manner as the said Justices, or the major part of them, at any of their sessions or adjournments, shall direct or appoint.' Then in case any person or persons so to be charged shall refuse or neglect to pay his, her or their proper proportion, then and in every such case the same shall be levied by distress and sale of the goods and chattels of every person so assessed and refusing or neglecting to pay the same. 'Provided always that every occupier or tenant, who shall have paid such damages as aforesaid, shall and may deduct and retain out of his, or her rent or rents so much money as he, or she shall so pay.' Sect. 50 enabled the Commissioners to allot the parts of the commons which were little capable of cultivation or improvement amongst the Bishop of Durham and the several other persons having right of common upon the moors and commons; and any such allotment which should be accepted and inclosed was made subject to the provisions relating to allotments of the more improvable parts of the commons. Under the provisions of a subsequent Act passed in 1779 the lands allotted to the Justices were sold for a perpetual quit rent of 30*l.* per annum."

The action came on for trial on February 15–17, 22–25, March 1–3, 8–11, 14–16, 1921, and the result of the evidence given at the trial appears from the following judgment of Peterson J.

Tomlin K.C. and *MacSwinney* for the plaintiffs.

Hughes K.C., *Maugham K.C.* and *F. K. Archer* for the defendants.

Cur. adv. vult.

1921. April 22. PETERSON J. [after stating the facts and material sections of the Lanchester Inclosure Act, 1773, as above set out, continued:] The question whether the

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lord and his assigns were entitled in the course of working the mines lying under the lands allotted in accordance with the provisions of that Act to let down the surface was considered by the Court of Appeal in the case of *Consett Waterworks Co.* v. *Ritson* (1) in 1889. The Court of Appeal (consisting of Lord Esher M.R. and Lindley and Lopes L.JJ.) held (2) that the lord and his assigns were, on the true construction of the Act, entitled to work the mines lying under the allotments in such a way as to cause subsidence. Prima facie, this decision would govern me in considering a similar question which arises under the same Inclosure Act. But the judgment of the Court of Appeal in that case has been exposed to very adverse criticism. In *Bishop Auckland Industrial Co-operative Society* v. *Butterknowle Colliery Co.* (the *Butterknowle Case*) (3) Farwell J. expressed great doubt whether *Ritson's Case* (1) and *Bell* v. *Earl of Dudley* (4) could stand with the subsequent decision of the House of Lords in *New Sharlston Collieries Co.* v. *Earl of Westmorland* (5); and in the same case in the Court of Appeal (6), Vaughan Williams L.J. expressed a similar doubt, and Romer L.J. obviously felt the difficulty of reconciling the observations of the Court of Appeal in *Ritson's Case* (7) with the decision of the House of Lords in the *New Sharlston Case.* (5)

In the House of Lords (8) Lord Macnaghten expressly stated that *Ritson's Case* (7) could no longer be regarded as an authority. Lord Atkinson, however, distinguished *Ritson's Case* (7) from the *Butterknowle Case*, considering that s. 45 of the 1773 Act was stronger in favour of the lord's right than the corresponding section in the *Butterknowle Case*, and that ss. 48 and 49 were material provisions which distinguished *Ritson's Case* (7) from the *Butterknowle Case*, as s. 48 set apart a fund for damages, while by s. 49 any deficit was to be made up by the owners or occupiers, the occupiers

(1) 22 Q. B. D. 318, 702.
(2) Post, p. 187n.
(3) [1904] 2 Ch. 419, 429.
(4) [1895] 1 Ch. 182.
(5) [1904] 2 Ch. 443n.
(6) [1904] 2 Ch. 419, 440.
(7) 22 Q. B. D. 702, post, p. 187n.
(8) [1906] A. C. 305, 314, 322, 323.

being entitled to deduct any payment which they were compelled to make from their rent, so that, in the result, the deficit was paid by the owners, and not by the tenants. But for reasons which appear later in the judgment, I venture to doubt whether the compensation provided is complete, and whether any deficit is necessarily thrown upon the owners of the allotments.

In these circumstances, it becomes necessary for me to consider the reasoning of the Court of Appeal in *Ritson's Case* (1), and inquire whether it is so inconsistent with propositions laid down by the House of Lords for guidance in considering Inclosure Acts that it is impossible any longer to regard it as sound. Lord Esher's judgment (2) begins with the observation that, having regard to the powers of the Prince Bishop of Durham, it might be anticipated that he would reserve to himself the greatest possible power. I do not myself appreciate how the construction of a document can be affected by the power or influence of one of the parties to it, but in any case the preamble shows that, among the commoners, were powerful and influential men, such as the Earl of Strathmore and Kinghorn, and Lord Widdrington. Moreover, s. 44 shows that in the case of timber the lord's rights were, in fact, diminished. The Master of the Rolls then accepts the proposition that an Inclosure Act is not to be construed so as to allow the lord to let down the surface of allotments by working mines under them, unless the language of the Act is clearly and unmistakably to that effect. This is substantially the same as the proposition laid down by the House of Lords in the *Butterknowle Case* (3) —namely, that the surface owner is entitled of common right to support for his property in its natural position, and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorized by the instrument of severance either in express terms or by necessary implication: per Lord Macnaghten, and also Lords Loreburn and Atkinson.

(1) 22 Q. B. D. 702, post, p. 187n. (2) Post, p. 187n.
(3) [1906] A. C. 305, 314, 322, 323.

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If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then the surface cannot be let down: per Lord Loreburn.

The Master of the Rolls then proceeded to consider s. 45, and expressed the view that the words of that section, omitting the final words, "without paying any damages or making any satisfaction for so doing," did not deprive the owners of the surface of their right to support. This view is clearly in accordance with the opinion in the House of Lords in the *Butterknowle's Case* (1): see, for instance, Lord Macnaghten's observations on p. 313, Lord Loreburn's on p. 309, and Lord Atkinson's on p. 320. Nor do the words "without paying any damages or making any satisfaction for so doing" displace the rights of the surface owners: see the *Butterknowle Case* (1), pp. 311 and 321. These words merely mean that the lord is not bound to make compensation for the consequences of acts which the section authorizes him to do, and cannot extend the scope of the powers conferred by the section. But the Master of the Rolls then dealt with the introductory words of s. 48. These words he read as meaning, whereas great inconveniences were being done and damage being done to particular allottees by working the mines without paying any damages or making any satisfaction for so doing. Without determining the question, he expressed the opinion which, for the purposes of his judgment, was an obiter dictum, that the words might indicate that the lord, by s. 45, was entitled to let down the surface. But if Lord Loreburn's test be applied, it appears to me to be impossible to say that the introduction of a clause prohibiting the lord from letting down the surface would create an inconsistency with the provisions of s. 45 and the introductory words of s. 48. Inconvenience or damage might be caused by searching for, winning, or working the mines without letting down the surface. It is, however, to be observed that there were precisely similar words

(1) [1906] A. C. 305.

introducing the compensation section in the *Butterknowle Case*. (1) It was, however, the compensation section which led the Master of the Rolls to the conclusion that the lord was entitled to let down the surface. Now the way in which he used the compensation clauses appears to me to be quite inconsistent with the opinion of the learned Lords in the *Butterknowle Case*. (2) He assumed that the "natural interpretation" of s. 45 was to authorize the lord to cause a subsidence, and treated the absence of compensation as a "fetter" on the "natural interpretation," and held that the presence of a compensation clause removed the "fetter" with the result that you must go back and construe the words of s. 45 according to their ordinary, and, therefore, their legal signification. This, he thought, was the result of the judgment of the House of Lords in *Love* v. *Bell* (3); but it is, to my mind, impossible in view of the opinions in the *Butterknowle Case* (2) to say that the natural interpretation of s. 45 is that the lord is entitled to cause subsidence. On the contrary, they are to be construed as not conferring any such right upon him, nor does it appear to be correct to say that it is the absence of a compensation clause which prevents the section from being construed in such a way as to confer the right of letting down the surface upon the lord. That result is due to the fact that in construing an Inclosure Act a provision authorizing the lord to work and enjoy the minerals as fully and freely as if the Act had not been passed is not sufficient to displace the common right of the owner of the surface to support, and to the fact that the introduction of a clause to the effect that the mines must be worked so as not to let down the surface could not create an inconsistency with the reservation to the lord. Where there is a doubt as to the meaning of a reservation to the lord, the construction of a compensation section may show that it could not have been intended to confer upon the lord the right to let down the surface. But the Master of the Rolls, in substance, held that the provision for compensation in the

(1) [1904] 2 Ch. 419, 420. (2) [1906] A. C. 305.
(3) 9 App. Cas. 286.

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1773 Act compelled the Court to interpret s. 45 in a manner in which, apart from such a provision, it could not have been construed. But while the absence or insufficiency of compensation may determine the construction of an ambiguous section in favour of the owner of the surface, it does not follow that the presence of a compensation clause, however sufficient it may be, is enough to show that the lord is entitled to do that which, if it were absent, he would not be entitled to do. Prima facie, compensation is payable in respect of authorized acts. The compensation section relates to the exercise of the powers conferred. The section may comprise words which show that it was contemplated that the lord should be able to let down the surface; for instance, an express reference to subsidence; but, normally, it covers only damages occasioned by acts which the statute authorized. Thus in the present case, s. 48 relates to damage caused by using any of the powers or liberties hereby reserved, that is to say, by s. 45. In such circumstances, it is difficult to see how a section providing for compensation in respect of powers conferred by another section can extend the scope of those powers. Thus Lord Macnaghten in the *Butterknowle Case* (1) expressly stated: "The provision of compensation in measure adequate to cover any damage likely to be caused by the exercise of the powers or privileges conferred is not sufficient to exclude the presumption in favour of the owners of the surface." So, too, Lord Loreburn, looking at the question from a slightly different angle, held that: "If the compensation clause is capable of being satisfied by reference to acts done on the surface, then, though it may be wide enough to cover also damage done to the surface by taking away the support, still it must be confined to damage done on the surface, and the inference that support might be taken away on payment of compensation would not be drawn." This appears to be the necessary consequence of applying Lord Loreburn's test, as the introduction of a clause to the effect that the surface must be let down would not create any inconsistency with the section which provides for compensation. Lord

(1) [1906] A. C. 305, 309, 313.

Robertson agreed with the judgment of Lord Loreburn L.C. See, too, the observations of Lord Davey on the subject, and the judgment of Lord Watson in *Love* v. *Bell* (1), and the observations of Lord Campbell in *Smart* v. *Morton*. (2)

In my opinion the reasoning of Lord Esher is inconsistent with the principles enunciated in the *Butterknowle Case*. (3) Lindley L.J.'s judgment (4) also, in my opinion, is inconsistent with the reasoning of the House of Lords in the *Butterknowle Case*. (3) Thus he laid great stress on the words at the end of s. 45, which freed the lord from liability for damages occasioned by the exercise of the powers conferred upon him, and on the preamble to the compensation section, s. 48. But the Act which was the subject of discussion in the *Butterknowle Case* (3) contained similar words, and a similar preamble to the compensation clause. He then proceeded to state the effect of s. 45, and quoted verbatim the words, "as fully and freely as he or they might or could have held used and enjoyed the same in case the Act had not been made and that without paying any damages or making any compensation for so doing." His view on these words was that it was impossible to say that there was not an implied power to let down the surface. But this conclusion is not consistent with the reasoning in the *Butterknowle Case*. (3) Nor do I think that the effect which he gives to the preamble to the compensation clause is consistent with the views of the learned Lords in the *Butterknowle Case*. (3) His view was that those words removed all doubt. But in the *Butterknowle Case* (3) there was a similar preamble to the compensation clause. I find it impossible to say that if any express provision against subsidence was inserted in the present Act it would, having regard to the *Butterknowle Case* (3), be inconsistent with the provisions of s. 45 or with the preamble to s. 48. Lindley L.J. did not rely upon the operative portions of the compensation clause, nor did he suggest that they afforded an adequate protection. Lopes L.J. took the view that without the compensation clause the language

(1) 9 App. Cas. 286.
(2) (1855) 5 E. & B. 30, 47.
(3) [1906] A. C. 305, 309, 313.
(4) Post, p. 193n.

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of the Act was sufficient to authorize the lord to let down the surface; but his reasoning cannot, in my opinion, be reconciled with that which commended itself to the House of Lords in the *Butterknowle Case.* (1) He, too, relied upon the preamble to s. 48. He also expressed the view, as did Lindley L.J., that it was difficult to understand how the mines could be effectively worked without letting down the surface. But this was not a difficulty which pressed upon the House of Lords in the *Butterknowle Case.* (1) If it were a sound argument, it would seem that the latter case must be determined in favour of the lord, for I infer from the language of the Lords Justices that their view was not based on any special evidence in the case. On analysis the proposition apparently means that if the minerals were to be worked out or worked to the fullest advantage the surface would, or might, be let down. But, as was shown in the present case, the mines could be worked commercially without letting down the surface. In my opinion, then, the reasoning of the members of the Court of Appeal cannot be reconciled with the views which were expressed by the House of Lords in the *Butterknowle Case.* (1)

But it was contended that even if the reasoning of the Court of Appeal in *Ritson's Case* (2) cannot stand, the true construction of the Act is such that the lord was impliedly given power to let down the surface. In construing this Inclosure Act I must loyally adhere to the rules for interpreting such Acts laid down by the House of Lords in *Love* v. *Bell* (3) and the *Butterknowle Case.* (1) It may be true as stated by Swinfen Eady L.J. in *Beard* v. *Moira Colliery Co.* (4) that it is "Difficult to appreciate exactly the grounds upon which the apparent departure from the language of the Inclosure Acts has been justified." Lord Macnaghten in the *Butterknowle Case* (1) observed that the construction which had been put on such a section as s. 45 reduced it to a dead letter for any practical purpose; and Lord Halsbury in *Butterley Co.* v. *New Hucknall Colliery Co.* (5), was apparently

(1) [1906] A. C. 305.
(2) 22 Q. B. D. 702, post, p. 187n.
(3) 9 App. Cas. 286.
(4) [1915] 1 Ch. 257, 267.
(5) [1910] A. C. 381, 383.

not perfectly satisfied with the result. But whatever may be said in cases which do not involve the construction of Inclosure Acts, for instance *Beard* v. *Moira Colliery Co.* (1); *Chamber Colliery Co.* v. *Twyerould* (2); and *Davies* v. *Powell Duffryn Steam Coal Co.* (3), the rules which have been laid down in *Love* v. *Bell* (4) and the *Butterknowle Case* (5) govern the construction of Inclosure Acts.

It is said that the words in s. 45, which enable the lord "to search for, drain, win and work the said mines wheresoever the same are or may be by any ways or means now in use or hereafter to be invented," show that the lord was entitled to remove all the coal and so let down the surface, for it is suggested one of the ways or means might be the longwall system of working. These are general words. If Lord Loreburn's test were applied and a clause prohibiting subsidence were inserted in the Act it would not, in my opinion, be inconsistent with that part of s. 45 which I have quoted. These words in such a case would, or might, refer to new or improved machinery for working the mines.

However, I find some difficulty in seeing how these words can operate as an addition to the other powers conferred by s. 45. The section professes to enable the lord to search for, win, and work the mines "as fully and freely as he could have held used and enjoyed the same in case this Act had not been passed." If the Act had not been passed the lord could have worked the mines in any way or by any means which he thought fit, although in doing so he let down the surface, so long as he left sufficient pasturage for the commoners. The words "as fully and freely" in themselves include "by any way or means." Yet it is well established that the words at the end of s. 45 are not sufficient to enable the lord to work the mines in such a way as to cause subsidence. It is not easy to see why the words "by any ways or means now in use or hereafter to be invented," which are implied in the words at the end of the section, should

(1) [1915] 1 Ch. 257.
(2) (1893) [1915] 1 Ch. 268n.
(3) [1917] 1 Ch. 488.
(4) 9 App. Cas. 286.
(5) [1906] A. C. 305.

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convert a section which otherwise would not justify subsidence into one which enables the lord to let down the surface, especially as they may be attributed to new forms of machinery, or to things done on the surface.

Reliance was also placed upon the compensation clauses, ss. 48 and 49, which it was said give complete compensation for any damage occasioned by subsidence and throw any deficit on the owners of the allotments, and, therefore, differentiate this case from the *Butterknowle Case*. (1) But I do not think that the provision which they make is so complete or so reasonable as was contended. Any deficit owing to the insufficiency of the fund constituted under s. 48, is by s. 49 to be raised by a rate, to be paid and borne by the owners and occupiers of all the allotments excluding that which was vested in the justices, but including that which belonged to the persons damnified; and it is provided that any occupier or tenant may deduct any damage which he pays out of the rent payable by him. The result of this provision might be that a tenant would be called upon to pay a considerable sum shortly before the expiration of his tenancy and have no opportunity of recouping himself by deducting it from his rent. Moreover, for the reasons which I have already given, I am of opinion that a compensation clause which would be adequate to cover damages by subsidence if power had been granted to the lord to let down the surface, cannot indicate that the section which confers powers on the lord includes a power to let down the surface, which, taken by itself, the section does not comprise. Nor should ss. 24 and 30 be disregarded in this connection. An allotment made in respect of copyhold or customary tenements is to be added to the tenement and is to be subject to the same customs as the tenement. Now under the custom of this manor the lord was entitled to work mines under a copyhold tenement, but was not entitled to let down the surface without the copyholder's consent.

The defendants' contention is that, though by s. 30 the allotment is added to, and becomes part of, the copyhold

(1) [1906] A. C. 305.

tenement, the lord is entitled to let down the surface of the addition to the tenement, although he is not entitled to do so in the case of the original tenement. The grant or reservation of the mines to the lord might, no doubt, be couched in such language as to confer this right; but where there is no clear grant or reservation to the lord of a right to let down the surface, such a provision as that which is contained in s. 30 confirms the view that the lord was not intended to have such a right. Sect. 30, in effect, places an allotment in respect of a copyhold tenement on the same basis as the tenement, except for the rent of 4*d.* per acre imposed by s. 25, which I assume was not paid in respect of copyhold tenements, and this involves the right according to the custom to have the surface supported. It would require very clear words to deprive the allottees of the right which prima facie is conferred upon them by s. 30.

I ought, before I leave this part of the case, to refer to *Benfieldside Local Board* v. *Consett Iron Co.* (1), in which the Act of 1773 was considered. By s. 19 the Commissioners are required to set out and appoint such public highways and roads over the more improvable parts of the common intended to be divided and enclosed as they think proper, and set out and appoint other parts for common quarries, common watering places for cattle, and common wells, and to assign and set out such common, public, and private horse and other roads, ways, passages, and bridges and such gates, stiles, hedges, sewers, drains and watercourses in, over or through the lands to be enclosed as they think convenient. By s. 33 the Commissioners are required to cause all such public highways, roads, passages, ways, bridges, and drains to be well and sufficiently made, and to give directions for the making by the allottees of such common or public and private roads, ways, passages, bridges, gates, stiles, hedges, sewers and watercourses, and for the maintenance and repair by the allottees of all the works contemplated by the section "for ever." One of the highways constructed under this section was injured by subsidence caused by the working of

(1) (1877) 3 Ex. D. 54.

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the Consett Iron Company and the Local Board sued the company for damages. The defendants contended that they were not liable, as s. 45 enabled them to work the mines without leaving any support. The Court, however, held that if the Act provided a highway by one clause it could not be read as intending by another clause to sanction the destruction of the highway.

In the present case it was urged with some force that as the Act provided for the working and perpetual maintenance and repair of roads, bridges, gates, hedges, sewers, drains and watercourses, and provided for the appropriation of parts of the commons for common quarries, common watering places and common wells, it was impossible to suppose that the Act intended to confer upon the lord the right of destroying the works which were to be made and maintained under the provisions of the Act; that the lord could not have any right of letting down or injuring them; and that it would be a fantastic result if the lord were bound not to let down the roads, highways, hedges, gates, sewers and drains, but was entitled to let down the surface of the allotments which were served by them. It is possible that it was intended that the lord should be obliged to support the hedges and gates which formed the boundaries of the allotment and the roads and drains which ran through the allotments, and entitled to let down the allotments themselves; but it appears to me to be a very improbable intention to attribute to the Legislature or to the persons who procured the Act.

Apart, then, from the question which I will now consider, I am of opinion that, having regard to the rules of construction which have been laid down by the House of Lords, and for the reasons which I have given, the lord under this Act was not entitled to let down the surface of the allotments, and I respectfully venture to agree with Lord Macnaghten that the decision in *Ritson's Case* (1) was erroneous.

But then it was contended that in 1773 the method of working coal mines in the county of Durham and under Lanchester Moor, in particular, was such that it inevitably

(1) 22 Q. B. D. 702, post, p. 187n.

caused the surface to subside, and that, in construing the Act, effect should be given to the method of working, which must have been in the contemplation of the various persons who were interested in procuring the Act. Counsel for the defendants did not put forward a custom, but said that it was the practice of mining in 1773 to take out 75 per cent. of the coal, and that this inevitably led to subsidence. It was also suggested that, commercially, it was impracticable to work in such a way as not to let down the surface. Assuming that the question of commercial practicability is one which would otherwise be relevant in such a case as this : see Lord Sumner's observations in *Thomson* v. *St. Catharine's College* (1), it is a question which does not arise in the present case ; for the evidence of the witnesses both for the plaintiffs and for the defendants agreed that in 1773 it was commercially practicable to work the mines without letting down the surface, and that it is commercially practicable at the present time.

In construing documents which confer mining rights, the method of working at the date of the instrument has been admitted as one of the surrounding circumstances in many cases. In *Bell* v. *Earl of Dudley* (2), which was a case under an Inclosure Act, the learned judge received and acted upon evidence that at the time when the Act was passed it was known that the working of the coal would cause subsidence, and that it was impracticable to work the thick seam of coal (thirty feet thick) without subsidence. In the *Butterknowle Case* (3) Lord Atkinson observed that the Act which was in question in *Bell* v. *Earl of Dudley* (2) was naturally construed with regard to the practice which had so long prevailed, and to the results necessarily arising in the working from the very nature of the subject matter.

In the *Butterley Case* (4) the question was one between lessees of an upper seam and lessees of a lower seam, and the Court of Appeal acted on the view that it was common knowledge to all persons conversant with mining that it would

(1) [1919] A. C. 468, 502.
(2) [1895] 1 Ch. 182.
(3) [1906] A. C. 305.
(4) [1909] 1 Ch. 37; [1910] A. C. 381.

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be impossible to work the lower seam at all without causing subsidence to the upper seam : see observations of the Master of the Rolls. (1) But this statement must be read in connection with the circumstances of the particular case, and ought not to be treated as a finding that any working of an underlying seam would let down a seam above it, even though pillars for its support be left ; for the evidence showed that the longwall system by which all the coal is removed was the recognized system in the district ; and that the necessary result of the application of this system was subsidence (2) ; and it is, I think, clear that the observations of the Court of Appeal, and of Lord Halsbury (3), had reference to the necessary consequences of the longwall system : see observations of Lord Macnaghten. (4)

In *Jones* v. *Consolidated Anthracite Collieries* (5) the dispute was one between lessees of coal and lessees of the surface of the Amman Valley. It was proved that coal in the Amman Valley had been worked for fifty years on the longwall system, which invariably caused subsidence. *Welldon* v. *Butterley Colliery Co.* (6) was an action by the owner of an allotment under an Inclosure Act of 1791 against the defendants, who were the successors in title of the lord to whom the mines were reserved by the Act in phraseology somewhat similar to that which is found in s. 45 of the Act in the present case. It was proved to the satisfaction of the Court, that, for a long time before the Act of 1791, the coal in the district was worked on the longwall system, which necessarily produced subsidence. The learned judge also found that " there is no method by which coal can be so worked as not to cause subsidence in this or any other part of the country." I think the learned judge when he said that there was no method by which coal could be worked as not to cause subsidence meant that coal could not be worked out, or to full advantage, without causing subsidence. This would be in accordance with the evidence in the present case.

(1) [1909] 1 Ch. 37, 47.
(2) [1908] 2 Ch. 475, 479.
(3) [1910] A. C. 381, 383.
(4) [1910] A. C. 385.
(5) [1916] 1 K. B. 123.
(6) [1920] 1 Ch. 130.

If the statement is to be read as meaning that coal cannot be worked at all without causing a subsidence the learned judge no doubt acted upon the evidence which was before him, but the evidence of the eminent mining engineers whom I have heard would not support so general a proposition, even if it be confined to mining operations at the present time. Mines under townships, railways, rivers, canals and the sea at Whitehaven and on the north-east coast of England are worked in such a way as to leave adequate pillars for the support of the roof and the prevention of subsidence. When I come to deal with the evidence on this branch of the case it will be seen that in past times in the first stage of the bord and pillar system, sufficient pillars were generally left for the support of the roof, and consequently for the support of the surface. The mere fact that before the Inclosure Act the lord had power to let down the surface so long as sufficient pasturage for the commoners was left does not assist on this part of the case, for this was true in the *Butterknowle Case* (1) and in *Love* v. *Bell.* (2)

The question is whether at the date of the Act the established practice of mining in the particular district was such that the inevitable consequence of employing it was subsidence. If, for instance, the longwall system had been the only system used in the district, the persons who procured the Act must have contemplated mining operations in accordance with it, but if there were two methods of mining in the district, one of which resulted in subsidence while the other did not, it would be impossible to say that the parties must have contemplated the system which caused subsidence; and if the mines in question were at the date of the Act worked in a way which did not let down the surface, while some other mines, it may be the majority in the district, were operated on a system which resulted in subsidence, it seems impossible to hold that, for the purpose of construing the document by reference to surrounding circumstances, regard ought to be had to the system which was not in use at these mines in question. The burden of establishing

(1) [1906] A. C. 305. (2) 9 App. Cas. 286.

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that the practice of working the mines under Lanchester Common in 1773 was such as to cause subsidence rests upon the defendants.

I will now state the conclusions which I have drawn from the evidence. Mining operations on Lanchester Common are of considerable antiquity. I have seen a lease of the mines granted by the Bishop of Durham in the reign of Queen Elizabeth, and according to Dunn on the Coal Trade, published in 1844, p. 12, mines in the parish of Lanchester were worked in the year 1333. In the early days up to the end of the eighteenth century, at least, the mines worked in the Durham district and elsewhere were necessarily mines at a comparatively small depth from the surface. In very early times miners apparently sunk bell pits, that is to say, sunk a short shaft to the coal, and then worked the coal within a small circumference, the shaft being the handle and the workings forming the bell. This method of working generally, if not always, resulted in some subsidence of the comparatively small pieces of surface which were affected. As engineering knowledge increased, this method was superseded by the first form of pillar and stall or bord and pillar working. Under this system the miners, starting from the bottom, hewed out the coal up to the end of the royalty but left sufficient coal in pillars for the support of the roof and the surface: see Compleat Collier, published in 1710, pp. 36 and 37. The amount left in the pillars varied according to the circumstances of each mine; but, speaking roughly, 40 per cent. to 50 per cent. of the coal was taken and 50 per cent. to 60 per cent. was left in pillars.

About 1738 the bord and pillar system began to undergo a further development. It was found that if larger pillars were left in the first working, that is in the working from the pits outward to the boundary, it was possible to reduce or remove parts of the pillars commencing with those which were further away from the pit and ending with those nearest to the pit. By adopting this method of bord and pillar working it became possible to extract about 75 per cent. of the coal. The removal of so large a percentage of the coal

speedily produced subsidence, and sometimes caused a creep of the whole mine before the second working was completed, with the result that, apart from danger to the men, the unworked pillars were lost. In 1809 what is known as the panel system was discovered. Under this system in the course of the first working barriers of solid coal were left so as to divide the mine into compartments and prevent any creep caused by the second working—that is to say, the reduction of the pillars—from affecting the compartments in which the pillars were still unworked. In this way greater security was obtained, and more of the coal could be removed on the second working.

The real question is to what extent had the development of the bord and pillar system, which began about 1738, become the established practice of mining on Lanchester Common and in its neighbourhood in 1773. The plaintiffs' witnesses agree that by this time the practice was well known and not infrequently adopted in the Durham coalfields; but they did not agree with the defendants' witnesses that it was the established practice, or that it had become substantially the only way in which the mines were worked in the district. At this distance of time it is naturally difficult to obtain evidence of a conclusive character on such a question. The defendants produced a number of viewers' reports made before 1773, which recommended the employment of the system of double working by bord and pillar in various collieries in the neighbourhood of Lanchester, or indicated that the pillars had been reduced on a second working, and showed that a small proportion of the coal in the original pillars had been, or was to be, left standing. Three of those reports made in 1755, 1756 and 1757 relate to three pits of the Pontop Colliery, Lanchester Common. Some of them refer to the second working or reduction of the pillars as regular. They show, as was admitted by the plaintiffs, that the system of double working and the reduction of the pillars was well known to mining engineers in the county of Durham, and was in many cases at least utilised by them. Various ancient plans were also produced which indicated

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that the mines to which they referred had been, or were being, worked on this system; but they were few in number. I had also the evidence of witnesses who had examined ancient workings in or near Lanchester Common, and found that the workings had in many cases been closed by subsidence caused by leaving too little coal for the support of the roof. But it is extremely difficult, if not impossible, to say in these cases when the workings in question were made. They may have been made after 1809 when the panel system was introduced. On the other hand, there is a report of November 20, 1828, on Fallowfield Colliery by Mr. Nicholas Wood, a well-known viewer at that time. In this report Mr. Wood stated that on inspecting the workings he found that the miners were pursuing the mode almost universally practised in the district of working the mining nine yards, taking out as a lode five yards, and leaving unwrought or standing four yards as a pillar, "and as it does not seem to be the practice to work the pillars out afterwards, four-ninths of the coal are therefore lost." The report as set out in the Bulman and Redmayne Colliery Working Management, pp. 12 and 13, concludes thus: "The principle on which the colliery has hitherto been worked not only during the present take, but in all previous ones, has been with a view of not obtaining the coal left as pillars, and this has been sanctioned by the custom of the district."

Again, if the practice of second working or reduction of the pillars to such an extent as to cause subsidence was by 1773 so established and general in the county of Durham as the defendants contend, it is curious that in *Smart* v. *Morton* (1) the evidence at the trial at the Durham Assizes in 1854 or 1855 should have proved that according to the course and practice of mining in the county till 1810 ribs of coal were left to support the surface.

Finally, the leases of the mines under Lanchester Common during the eighteenth century constitute a great difficulty in the way of the defendants' contention that in 1773 it was the established practice to work the mines under the commons

(1) 5 E. & B. 30.

in such a way as to cause subsidence. I have seen copies of seven sample leases of these mines, L.5 and L.1 to 7, beginning with one which was granted in 1582–83 and ending with one dated November 17, 1835. One of them was granted in 1773. From 1842 the leases were always substantially in the same form. In each case the Bishop of Durham demised the coal under the commons and the copyhold lands in the parish of Lanchester and any quarries within the commons or copyholds, together with free way and passage through the waste grounds or copyhold lands, the lessee making satisfaction to the owners of the copyholds for damage done to their grounds, with all means of carriage to and from the pits and quarries. The leases contained covenants by the lessee that he would "well and orderly work the pits in such good manner and sort as every pits in the said County are usually or ought to be wrought," and that he would "leave sufficient walls and pillars of coal for support of the roof of the said colliery and coal mines."

The point of these leases for the purpose of the present case is that the lessee covenanted to leave sufficient walls and pillars of coal for support of the roof of the mines. If he was bound to leave sufficient support for the roof he was precluded from letting down the surface and was therefore not entitled to employ any system of mining which would cause subsidence.

It was contended by the defendants that this covenant meant that the lessee was bound to leave sufficient support of the roof of the colliery so long as it was a colliery; and that as soon as the mine or colliery was worked out and there was no more coal to be got the operation of the covenants came to an end. I am unable to accept this construction. The word "leave" prima facie means leave at the end of the term granted by the lease. It is very probable that the lessor would desire to have the access by means of the underground workings maintained, although the coal in the winning made by the lessee had been worked up to the maximum extent permissible.

But on the question of construction there is another

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formidable difficulty, which prevents me from accepting the defendants' contention. The leases cover not only the coal under the waste or common but also the coal under the copyhold tenements. Under the custom of the manor the lord was entitled to work the minerals under the copyholds, and apparently, if I may draw an inference from the leases, he was entitled to enter upon the copyhold tenements for these purposes; but he was not entitled under the custom to mine in such a way as to let down the surface of the copyholds.

In these circumstances the covenant must, so far as copyholds are concerned, be a general and unlimited covenant for the support of the roof and, therefore, of the surface. If this is so it is impossible to construe the covenant in a different way in relation to mines under the wastes or commons. It appears, therefore, that in and before 1773, which is the critical date for this purpose: see *Smart* v. *Morton* (1), that the lessees of the mines under the commons were bound by covenant to support the surface. Whatever then may be the frequency with which mines in the county of Durham were worked in such a way as to cause subsidence, the mines under Lanchester Common could not have been worked in this way without breach of covenant. If it be necessary to search for reasons for not applying to these mines a method of working which was known and applied in the cases of at least a considerable number of these mines in the county it may be suggested first that, as mines under the commons and mines under the copyhold tenements were included in one demise, it was thought desirable that they should all be worked on a system which gave that support to the surface which was, owing to the custom of the manor, necessary in the case of the mines under the copyholds; and, secondly, that the lord was not content to leave to the lessee the determination of the question how much of the surface of the commons he could let down without unduly diminishing the pasturage available for the commoners. It may be that in some cases the lessees reserved express permission, notwithstanding the covenants, to work out all or nearly all

(1) 5 E. & B. 30, 48.

the coal, under some part of the surface which was not of any value to the commoners, or that the Bishop was not always as strict as he might have been in enforcing the lessees' obligation. Whatever the reason may be, I cannot, in face of the lessee's covenants in these leases, come to the conclusion, on the evidence before me, that in 1773 it was the recognized and established practice to work the mines under Lanchester Common in such a way as to cause subsidence.

I am, therefore, of opinion that the plaintiffs have established their right to prevent the defendants from letting down the surface of their land.

R. M.

C. A.

The defendants appealed. The appeal was heard on December 2, 5, 6, 7, 8, 9, 12, 13, 1921.

Hughes K.C., *Maugham K.C.* and *F. K. Archer* for the appellants.

Tomlin K.C., *MacSwinney* and *Gavin T. Simonds* for the respondents.

Cur. adv. vult.

The arguments on the appeal on the construction of the Act were substantially the same as those used in the Court below, which sufficiently appear from the judgment of Peterson J., and having regard to the view taken by the Court of Appeal of the binding effect of *Consett Waterworks Co.* v. *Ritson* (1) it has been thought unnecessary to report them.

The following authorities were referred to: *Consett Waterworks Co.* v. *Ritson* (1); *Benfieldside Local Board* v. *Consett Iron Co.* (2); *Duke of Buccleuch* v. *Wakefield* (3); *Davis* v. *Treharne* (4); *Love* v. *Bell* (5); *Carnell* v. *Harrison* (6); *Osborne* to *Rowlett* (7); *The Vera Cruz* (*No.* 2) (8); *In re Moore* (9); *Butterknowle Colliery Co.* v. *Bishop Auckland*

(1) 22 Q. B. D. 318, 702, post, p. 187n.
(2) 3 Ex. D. 54.
(3) (1870) L. R. 4 H. L. 377.
(4) (1881) 6 App. Cas. 460.
(5) 9 App. Cas. 286.
(6) [1916] 1 Ch. 328.
(7) (1880) 13 Ch. D. 774.
(8) (1884) 9 P. D. 96.
(9) [1901] 1 Ch. 691.

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Industrial Co-operative Co. (1); *Liford's Case* (2); *Jefferson* v. *Bishop of Durham* (3); *Knight* v. *Mosely* (4); *Ecclesiastical Commissioners* v. *Wodehouse* (5); *Smart* v. *Morton* (6); *Mostyn* v. *Lancaster* (7); *Bonomi* v. *Backhouse* (8); *Harris* v. *Ryding* (9); *Humphries* v. *Brogden* (10); *Dalton* v. *Angus* (11); *Butterley Co.* v. *New Hucknall Colliery Co.* (12); *Hayles* v. *Pease & Partners, Ld.* (13); *New Sharlston Collieries Co.* v. *Earl of Westmorland* (14); *Attorney-General* v. *Dean and Canons of Windsor* (15); *Caledonian Ry. Co.* v. *Walker's Trustees* (16); *Quinn* v. *Leathem* (17); *Blackett* v. *Bradley* (18); *Chamber Colliery Co.* v. *Twyerould* (19); *Thomson* v. *St. Catharine's College, Cambridge* (20); *Beard* v. *Moira Colliery Co.* (21); *Davies* v. *Powell Duffryn Steam Coal Co.* (22); *Welldon* v. *Butterley Co.* (23); *Rowbotham* v. *Wilson* (24); *Gill* v. *Dickinson* (25); *Smith* v. *Darby* (26); Sheppard's Touchstone, vol. i., p. 87a.

1922. April 10. The following judgments were delivered:

LORD STERNDALE M.R. This appeal from Peterson J. is concerned with a question as to the respective rights of the surface owners and the mineral owners under the Lanchester Inclosure Act, 1773. The plaintiffs, the respondents, claiming through the allottees of the surface, asked that the defendants, the appellants, who claim through the mineral owners, should be restrained from working the minerals so as to let down or imperil the surface. The defendants on the other hand claimed a right to work the minerals as they chose irrespective of

(1) [1906] A. C. 305.
(2) (1614) 11 Rep. 46b.
(3) (1797) 1 Bos. & P. 105.
(4) (1753) 1 Amb. 176.
(5) [1895] 1 Ch. 552.
(6) 5 E. & B. 30.
(7) (1883) 23 Ch. D. 583.
(8) (1858) E. B. & E. 622.
(9) (1839) 5 M. & W. 60.
(10) (1850) 12 Q. B. 739.
(11) (1881) 6 App. Cas. 740.
(12) [1910] A. C. 381.
(13) [1899] 1 Ch. 567.
(14) [1904] 2 Ch. 443n.
(15) (1860) 8 H. L. C. 369.
(16) (1882) 7 App. Cas. 259.
(17) [1901] A. C. 495.
(18) (1862) 1 B. & S. 940.
(19) [1915] 1 Ch. 268n.
(20) [1919] A. C. 468.
(21) [1915] 1 Ch. 257.
(22) [1917] 1 Ch. 488.
(23) [1920] 1 Ch. 130.
(24) (1860) 8 H. L. C. 348.
(25) (1880) 5 Q. B. D. 159.
(26) (1872) L. R. 7 Q. B. 716.

whether damage was done to the surface or not. Peterson J. decided in favour of the respondents and this appeal is brought by the defendants.

A lengthy, able and interesting argument was addressed to us as to Peterson J.'s decision upon the construction of the Act and the consequent rights of the parties, and the learned judge considered himself at liberty to examine and form his own opinion upon the Act. I hope I do not take too narrow a view of the case, but I think that we are not at liberty to form our own opinion on the matter, and that the case is governed by authority whether we accept the argument of the appellants or that of the respondents. Of course the result will be different, but in each case it will, in my opinion, be a result at which we are bound by authority to arrive. My reasons for this conclusion are as follows.

In the year 1889 the Court of Appeal (then consisting of Lord Esher M.R., Lindley and Lopes L.JJ.) in *Consett Waterworks Co.* v. *Ritson* (1) decided the same question that is now before us upon the construction of the same Act of 1773. They held upon the true construction of the Act that the lord and his assigns—that is to say, the mineral owners—were entitled to work the minerals in such a way as to let down and injure the surface. This was a decision between different parties, and therefore no question of res judicata arises, but it was a decision of the identical question arising upon the construction of the identical Act. It is therefore binding upon us unless it has been overruled, or unless it was given in circumstances different from those of the case before us. I will deal with the question of the circumstances first. There are no additional circumstances suggested by the respondents which could alter the construction of the Act in their favour, but the appellants did give evidence which they alleged proved a practice of mining so as to let down the surface to have been in existence over this district at the time of the passing of this Act. This was a circumstance, as they contended, existing at the time of the passing of the Act which had to be considered in construing it. This

(1) 22 Q. B. D. 702, post, p. 187n.

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circumstance they alleged pointed in the direction of a construction which would continue the right of that method of working to the lord and his assigns. I think the appellants fail on this point. Assuming the effect of such a custom to be what they allege I agree with the learned judge that the evidence did not establish such a recognized and established practice as to affect the construction of the Act. I think therefore that the decision of this Court in 1889 was given on the same point in respect of the construction of the same Act and in circumstances that did not for this purpose differ from those of the present case. If not overruled therefore I think it governs our decision here, and I wish to say what I think must be taken to be the meaning of overruled for this purpose. I think it must have been overruled in the sense that decisions of a superior Court have shown it to be a wrong decision on the point, and in respect of the Act on which it was decided. If it be shown to have been so overruled then we are bound to treat it as a wrong decision, and to construe the Act as the other decisions cited show it should be construed —that is to say, so as not to give the lord and his assigns the right to let down the surface. I think therefore as I have said, with respect to Peterson J., that if we are to accept the appellants' contention that the case is not overruled, we are bound to allow the appeal, and, if we accept that of the respondents that it is overruled, we are bound to dismiss it, and that it is not open to us in either case to construe the Act for ourselves.

I think it is essential to bear in mind the true meaning of the case being overruled, because if the decision on the identical point before us arising out of the construction of the identical Act is not displaced it binds us although the reasoning upon which the decision is founded may have been so disapproved and displaced as to make the case no authority upon the construction of a distinguishable though somewhat similar Act. I do not in the least mean to say that the express term overruled need be used, but the effect of the decision of the superior Court must be such as to show that the former decision cannot stand even on its own facts

and in respect of the Act on which it was decided. It is by no means uncommon for a superior Court to say that a case which it is considering is wrong in its reasoning, and cannot be used as an authority in other cases, but that on its own facts it can be supported, and this may be expressed by implication as well as expressly. In such a case the decision remains an authority on its own facts and circumstances, but they must be the same, and a very slight difference will take a subsequent case out of the authority of the former one. Here I can see no difference between the circumstances of the case before us and those of the case decided in 1889.

The true way to consider the authority of a case decided upon the identical circumstances of one under consideration is I think stated by Cockburn C.J. in delivering the judgment of himself, Wightman J. and Blackburn J. in *Blackett* v. *Bradley*. (1) He says: "In this case, which was argued before my brothers Wightman and Blackburn and myself, on the argument on the demurrer to the plea it was admitted that, if *Hilton* v. *Lord Granville* (2) was to be considered as law, the present case was within the decision in that case, and, so far as this Court was concerned, must be governed by it. But it was insisted, on the part of the defendants, that the case of *Hilton* v. *Lord Granville* (2) had been so much impugned and shaken by subsequent cases that it must be considered as virtually overruled; at all events sufficiently so to call upon the Court to review the decision in that case, and, upon the arguments urged against its validity, now to overrule it. There can be no doubt that to some extent the authority of *Hilton* v. *Lord Granville* (2) has been shaken, inasmuch as a position assumed in the reasoning of the Court as one of the grounds of its decision has since been distinctly overruled in the House of Lords in the case of *Rowbotham* v. *Wilson* (3), in which the question presented itself for adjudication. And it cannot be denied that the decision itself has not met with the universal approval of the profession; and that it may be desirable that the validity of that

(1) 1 B. & S. 940, 954. (2) (1845) 5 Q. B. 701.
(3) 8 H. L. C. 348.

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decision should be brought under the consideration of a Court of error. At the same time it is equally clear that, though the reasoning of this Court in *Hilton* v. *Lord Granville* (1) has been impugned, the decision in that case has not been overruled. And, the judgment having been a considered judgment of the Court, and standing unreversed we do not feel ourselves at liberty to consider ourselves as otherwise than bound by it."

There have been at least three decisions upon this Act besides the one in 1889, but for reasons I shall give I do not think they afford any help. Two of them, *Blackett* v. *Bradley* (2) which I have already mentioned and *Gill* v. *Dickinson* (3), are directly opposed to one another, but they were both decided upon demurrer which involved the assumption of the correctness of the facts stated which were different from those of this case, and the former was decided also under a misconception as to the effect of an authority said to govern the case. The third case is that of *Benfieldside Local Board* v. *Consett Iron Co.* (4) This case was concerned with the question of letting down the surface of public roads set out under the Inclosure Act, and I think the decision turned a good deal upon a consideration of the bearing of public and private rights. In any case it was a decision of a Court of first instance, and could not prevail against those which I am now about to mention.

It was very forcibly argued before us that the authority of *Consett Waterworks Co.* v. *Ritson* (5) was entirely destroyed and the decision shown to be wrong by decisions in the House of Lords, notably *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Co.* (6) and *Love* v. *Bell* (7) decided in 1884 before the case of *Consett Waterworks Co.* v. *Ritson* (5), but approved in later cases. I think there is no doubt that the judgments in those cases are contrary to the reasoning upon which the decision in *Consett*

(1) 5 Q. B. 701.
(2) 1 B. & S. 940.
(3) 5 Q. B. D. 159.
(4) 3 Ex. D. 54.
(5) 22 Q. B. D. 702, post, p. 187n.
(6) [1906] A. C. 305.
(7) 9 App. Cas. 286.

Waterworks Co. v. *Ritson* (1) was founded and that they destroy the authority of that decision in any case depending upon a similar but distinguishable Act or upon similar but distinguishable circumstances. The question however remains whether they override it upon its own Act and its own circumstances. I do not say how I should decide this point if the case had not been considered upon it in this Court and in the House of Lords, and I think it is necessary to see the manner in which it was then treated. I do not think I need do more than examine the way in which *Butterknowle Colliery Co.* v. *Bishop Auckland, &c., Co.* (2) dealt with it. In the Court of first instance Farwell J. expressed a doubt whether that case could stand with the subsequent decision of *New Sharlston Collieries Co.* v. *Earl of Westmorland* (3), but he distinguished it from the case then before him. When that case came before the Court of Appeal the Court's attention was expressly directed to the point, and it was asked to express the opinion that *Consett Waterworks Co.* v. *Ritson* (1) was not consistent with the cases mentioned, and therefore not an authority. (4) If the Court had held that view there would have been no necessity to distinguish *Consett Waterworks Co.* v. *Ritson* (1); it would have been enough to say that it was overruled, but Vaughan Williams L.J. though expressing the same doubt as Farwell J. distinguished it from the case then before the Court (5), and so did Romer L.J. (6), intimating that he would have been bound to follow or would have followed it if not distinguishable. Cozens-Hardy L.J. agreed. So far then I think the Court did not hold the case to be overruled, but of course this may have been the courtesy of one Court of co-ordinate jurisdiction to another.

That case of *Butterknowle Colliery Co.* v. *Bishop Auckland, &c., Co.* (2) however then came before the House of Lords, and there even if the case were not up to that time overruled it was open to the House of Lords to do so. The report of the

(1) 22 Q. B. D. 702, post, p. 187n.
(2) [1906] A. C. 305.
(3) [1904] 2 Ch. 443n.
(4) [1904] 2 Ch. 435.
(5) [1904] 2 Ch. 419, 438, 439, 440.
(6) [1904] 2 Ch. 419, 441, 442.

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argument in the Law Reports is so scanty that the nature of the allusion to *Consett Waterworks Co.* v. *Ritson* (1) does not appear, and that in the Law Journal (2) is worse, for there is no report of the argument at all, but from the report in the Law Times (3) it does appear that the House was directly asked to say that the case could not stand with the later decisions and so to overrule it. In my opinion the House did not do so. It is true that Lord Macnaghten stated that the case could no longer be considered an authority, and I think he meant to say it was wrong, and not only that it was not an authority in a similar but not the same case, but the noble and learned Lord was only one of five members of the House then sitting. In spite of the direct appeal to the House to overrule the case two of the noble and learned Lords, Lord Loreburn and Lord Davey, did not mention it at all, Lord Atkinson considered it with great care and distinguished it from the case then before the House on grounds similar to but more detailed than those mentioned in the Court of Appeal by Vaughan Williams L.J., and Lord Robertson expressed his agreement with the opinion of Lord Loreburn and Lord Atkinson. Lord Loreburn, as I have pointed out, did not mention the case, but Lord Robertson expressed his agreement with the opinion of Lord Atkinson who distinguished and not with that of Lord Macnaghten who considered it no longer as of authority. It seems to me that both the Court of Appeal and the House of Lords though expressly asked to treat the case as overruled declined to do so or at any rate treated it as distinguishable, and in the position I have before mentioned of a decision founded on wrong reasoning but not overruled on its particular facts. If this be the right conclusion then as we have here to deal with the same facts and the same Act I think we must follow the decision however discredited in its reasoning, and that on this ground the appeal should be allowed.

I have already expressed a hope that this may not be too

(1) 22 Q. B. D. 702, post, p. 187n. (2) 75 L. J. (Ch.) 541.
(3) 94 L. T. 795.

narrow a view; if it be I am glad to know it can easily be corrected, and I hope that the true position of *Consett Waterworks Co.* v. *Ritson* (1) may be settled, for its present position is certainly a difficult one for Courts of a jurisdiction inferior to the House of Lords.

The appeal must be allowed with costs here and below, and judgment given for the defendants.

WARRINGTON L.J. In the year 1773 an Act was passed for the enclosure of a large area of common land in the coal district of the county of Durham known as Lanchester Common. Lanchester Common was part of a common whereof the Bishop of Durham was the lord and in him, prior to the passing of the Act and the award thereunder, were vested the soil of the common and the mines and minerals therein and thereunder and he had full power to work the same even so as to cause damage to the surface by subsidence provided only he left sufficient common of pasture for the use of the commoners. The Act reserved to the Bishop and his executors and his or their lessees and assigns the mines and minerals and quarries in and under the common and conferred upon them in general words of the fullest possible nature powers of searching for winning and working such mines and minerals and quarries and doing in or under the surface things necessary for or incidental thereto, "as fully and freely as he or they might or could have had held used and enjoyed the same in case this Act had not been made and that without paying any damages or making any satisfaction for so doing." The Act also provided compensation (the particular nature of which I need not mention for the purpose of this preliminary statement) for the "great inconveniences and damage" which the Act states may happen and be done, "to particular persons by reason of searching for winning and working the said mines and quarries within and under their respective allotments."

The plaintiffs are the present owners of a portion of the common allotted to their predecessors by the award made

(1) 22 Q. B. D. 702, post, p. 187n.

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under the authority of the Act. The defendants are lessees under the Ecclesiastical Commissioners, the successors of the Bishop of Durham of the mines of coal under the plaintiffs' land and lands adjacent thereto.

The plaintiffs complain that they have suffered damage through the subsidence of the surface of their land occasioned by the underground workings of the defendants, and they claim damages and an injunction restraining the defendants from further working so as to cause subsidence.

The defendants contend that according to the true construction of the Act of 1773 the holders of allotments never acquired the right of support as against the lord of the manor as the owner of the minerals under the common, and accordingly that they and their predecessors always have been, and are now, entitled so to exercise their powers of working the mines as to cause subsidence of the surface.

The identical question for determination in the present case was raised and determined by the Court of Appeal in favour of the successors of the lords of the manor in *Consett Waterworks Co.* v. *Ritson* (1), in the year 1889. Except that the surface and mineral owners respectively were not the same, all the material facts were identical with those in the present case, and the Act of Parliament, the construction of which was in issue, was the Act of 1773—the Act the construction of which is in issue here. In saying that all the material facts in the two cases are identical I am not forgetting that the defendants set up the case that there was a special custom or practice in the neighbourhood at the date of the Act justifying working in such a manner as to injure the surface by subsidence, but I agree with the learned judge that this case was not established. Even if it had been, the additional fact would have been favourable to the defendants and would not affect the question of the effect of the decision in *Consett Waterworks Co.* v. *Ritson.* (1) Prima facie it would be the duty of the judge of first instance and of this Court to follow the decision of the Court of Appeal in the previous case leaving to the higher tribunal to say,

(1) 22 Q. B. D. 702, post, p. 187n.

if they should be so advised, that that decision was incorrect. But it is contended by the plaintiffs, and Peterson J. has accepted their contention, that the House of Lords has already overruled, not expressly but as the necessary result of their action, the decision in *Consett Waterworks Co.* v. *Ritson* (1) by their own decision in the *Butterknowle Colliery Co.* v. *Bishop Auckland, &c., Co.* (2)

The first question, therefore, is, in my opinion, whether this Court ought to treat the decision in *Consett Waterworks Co.* v. *Ritson* (1) as having been overruled, and therefore not binding upon them, and it would only be after answering that question in the affirmative that they would be entitled to determine for themselves the question raised in the present action. It must, I think, be conceded that a decision of an inferior Court may be treated as having been overruled by a decision of a superior Court with which it is shown to be inconsistent although it is not expressly so stated by those who concur in such decision. But it is the decision of the Court, not the dicta of individual members unless they be essential to the ratio decidendi, which has to be considered in determining such a question. Lord Campbell in advising the House in *Attorney-General* v. *Dean and Canons of Windsor* (3) makes the following observations on the cognate question as to the binding nature on the House itself of its decisions: "Its decisions are authoritative and conclusive declarations of the existing state of the law, and are binding upon itself when sitting judicially, as much as upon all inferior tribunals. The observations made by members of the House . . . . beyond the ratio decidendi which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed in as far as they may be considered agreeable to sound reason and to prior authorities." In *Blackett* v. *Bradley* (4) Cockburn C.J. in answer to the contention that a previous decision of the Court of Queen's Bench in *Hilton* v. *Lord Granville* (5) must be

(1) 22 Q. B. D. 702, post, p. 187n.
(2) [1906] A. C. 305.
(3) 8 H. L. C. 369, 391.
(4) 1 B. & S. 940, 954.
(5) 5 Q. B. 701.

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considered as virtually overruled said: "There can be no doubt that to some extent the authority of *Hilton* v. *Lord Granville* (1) has been shaken, inasmuch as a position assumed in the reasoning of the Court as one of the grounds of its decision has since been distinctly overruled in the House of Lords in the case of *Rowbotham* v. *Wilson* (2) in which the question presented itself for adjudication. And it cannot be denied that the decision itself has not met with the universal approval of the profession; and that it may be desirable that the validity of that decision should be brought under the consideration of a court of error. At the same time it is equally clear that, though the reasoning of this Court in *Hilton* v. *Lord Granville* (1) has been impugned, the decision in that case has not been overruled." The Court then gave judgment following *Hilton* v. *Lord Granville* (1) and expressing no opinion of their own one way or the other. The conclusion I draw is that in order that a case may be treated as overruled one must find either a decision of a superior Court inconsistent with that arrived at in the case in question, or an expression of opinion on the part of that Court as a whole that such case was wrongly decided on its own facts and not merely that it ought not to be treated as an authority in a case arising out of different facts.

The decision said to be overruled in the present case is a decision on the true construction of a particular Act of Parliament—the Lanchester Inclosure Act of 1773. The decision by which it is said to have been overruled is one on the true construction of another Act of Parliament—the Hamsterley Inclosure Act of the 31 Geo. 2. The provisions of the two Acts are not identical in their terms, and there is I think no question that those of the Act of Geo. 2, especially those relating to compensation for damage, were more favourable to the existence of the right to support than those of the Act of 1773. At first sight it is difficult to see how a decision on the true construction of one Act can be said to have overruled a decision on the true construction of another Act materially different in its

(1) 5 Q. B. 701. (2) 8 H. L. C. 348

terms. The two decisions as decisions might well stand together for the reason indicated in the previous sentence. But it is necessary to consider the question a little more closely inasmuch as it is contended that there are certain principles of construction laid down by the House of Lords as applicable to all Acts of Parliament of the particular class and that these principles have been misunderstood or misapplied by the learned judges who decided the case in question. The decision was that of the Court of Appeal consisting of Lord Esher, and Lindley and Lopes L.JJ. It was given in the year 1889. The authority most strongly relied upon by the then plaintiffs as laying down principles applicable to the case before the Court was *Love* v. *Bell* (1) and particularly the speech of Lord Selborne in that case. I think it is clear that the learned judges in the Court of Appeal realized the general nature of the views as to the construction of such Acts of Parliament expressed by Lord Selborne and adopted by the House and intended to act upon them. Their decision was plainly not inconsistent with the decision in *Love* v. *Bell* (1), for the Act there in question but that it was also an Inclosure Act, was in its terms infinitely more favourable to the contention of the allottees than the Act of 1773. Lindley L.J. was a party to the decision, *Bell* v. *Love* (2), which was affirmed in the House of Lords, and his reasons consistent with the principles laid down in the House of Lords are clearly stated in his judgment. (3) I think the principle of construction may be summed up in this, that in an Inclosure Act the reservation of mines with wide general powers of working will not confer on the owner of the mines the right to let down the surface unless the intention to confer such right appears by express terms or by necessary implication. In *Love* v. *Bell* (1) the Court came to the conclusion that the lord had not made out his right under the Act then in question; in *Consett Waterworks Co.* v. *Ritson* (4) the Court of Appeal on another Act of Parliament came to the opposite conclusion. I am clearly of opinion so

(1) 9 App. Cas. 286.
(2) (1883) 10 Q. B. D. 547.
(3) 10 Q. B. D. 568, 569.
(4) 22 Q. B. D. 702, post, p. 187n.

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far if nothing else had happened this Court would be bound to follow *Ritson's Case* (1), leaving it to the House of Lords to say whether the decision was correct or not.

But it is contended that the House of Lords have already in effect said that it is incorrect by their decisions in two cases, first the *New Sharlston Collieries Co.* v. *Earl of Westmorland* (2), and secondly, *Butterknowle Colliery Co.* v. *Bishop Auckland, &c., Co.* (3) I think it is really only necessary to consider the second of these two cases, for if that did not override *Consett Waterworks Co.* v. *Ritson* (1) the other certainly did not. In the first place the two decisions as such are not inconsistent with each other owing to the differences in the provisions of the two Acts of Parliament. Did then the noble Lords who took part in the decision of the later case or a majority of them expressly or by implication express the view that the decision in the earlier case was incorrect on its own facts ? I think not. The decision had been criticised adversely in the Court of first instance and in the Court of Appeal and was relied upon in the House of Lords, the Act of 1773 and the judgments of the Court of Appeal being included in the appendix. The noble Lords who took part in the decision were Lords Loreburn, Macnaghten, Davey, Atkinson and Robertson. Lord Loreburn makes no reference to the case in question nor does Lord Davey, who however does say that the cases run very fine, and that the question for decision must ultimately depend on the proper construction of the words of the statute. Lord Macnaghten does observe in passing that in his opinion the case in question can no longer be regarded as an authority. He does not say that it was wrongly decided on its own facts but I will assume that this is what he meant. Lord Robertson said he had read the judgments of Lord Loreburn and Lord Atkinson and agreed with them. He had apparently not read Lord Macnaghten's. Lord Atkinson took the trouble to distinguish *Consett Waterworks Co.* v. *Ritson* (1) from the case before the House first in respect of the words of the clause

(1) 22 Q. B. D. 702, post, p. 187n. (2) [1904] 2 Ch. 443n.
(3) [1906] A. C. 305.

reserving the rights of the Lords as to working coal, and secondly in respect of the provisions as to compensation. It cannot in my opinion be said that this learned Lord said that the case in question must be treated as overruled. The result is that one member of the House may be said to have treated the case as overruled, two treated it as distinguishable, and two did not refer to it. Under these circumstances Peterson J. was not, in my opinion, justified, nor would this Court be justified, in refusing to follow the decision in *Consett Waterworks Co.* v. *Ritson* (1), but should leave it to the superior Court to overrule if they think fit. Following then this case and expressing no opinion as to its correctness or the reverse I think the present appeal ought to be allowed and judgment entered for the defendants with costs here and below.

YOUNGER L.J. The Master of the Rolls and the Lord Justice have stated in detail the considerations which have led them to the conclusion that the decision of this Court in *Ritson's Case* (1) should have been in the present litigation treated by the learned judge, and must be regarded by us, as an authority to be accepted and applied without further question. I am entirely of the same opinion and for the same reasons. In my judgment *Ritson's Case* (1) has, in no sense relevant for present purposes, been overruled by any Court competent to overrule it. In this connection the words of Lord Westbury in *Hills* v. *Evans* (2) may be recalled. "I cannot too often repeat," he there says, "that what is said by a noble and learned Lord in moving the judgment of the House of Lords, does not by any necessity enter into the judgment of that House." The judgment of my Lord just delivered indicates the relevance of that observation of Lord Westbury's as applied to the judicial history of *Ritson's Case.* (1) It may indeed even be true that no individual judge who has subsequently canvassed or distinguished that case, has so far committed himself as to declare that the decision as a decision on the terms of its own

(1) 22 Q. B. D. 702, post, p. 187n. (2) (1862) 31 L. J. (Ch.) 457, 461.

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statute, was wrong, and the very searching and detailed examination of the provisions of that statute which has been made before us—an advantage which I feel sure no other Court since *Ritson's Case* (1) has yet enjoyed—has at least served to show how perilous such a declaration would have been, had it, in a case under another statute been hazarded. It is, however, enough now to say, that no authoritative deliverance upon *Ritson's Case* (1) propounded since that decision was given justifies us in denying to it in this Court full effect, and especially so in an appeal which raises, as this appeal does, the same issue under the same statute and raises it in circumstances and supported by evidence certainly not less favourable to the conclusion reached in *Ritson's Case* (1) than were the circumstances under the consideration of the Court there. I need put it no higher than that. We are, in my judgment, in duty bound to treat that decision as an authority conclusive of the present appeal in this Court, whatever we ourselves might think of it. And there I would be content to stop but for one thing. As a result of the very careful examination of the Act of 1773 undertaken before us there have been brought into prominence certain provisions of that statute, which in the light of the *Butterknowle Case* (2) itself may, as it seems to me, go far of themselves to justify the conclusion reached in *Ritson's Case* (1), although they in no way entered into the reasoning on which that conclusion was based. I refer to the set of provisions—not paralleled or reproduced in any other Inclosure Act to which our attention was directed—relating to what in the statute are referred to as the less improvable parts of the moors or commons thereby intended to be divided, set out and allotted. The provisions of the Act with reference to these are in striking contrast to its provisions with reference to the so-called residue or more improvable parts of the same moors or commons, but while this is so it will be found that the section of the Act reserving the mines to the Bishop and the right to work them in the extremely wide terms which are referred to in the judgment of the learned judge apply equally

(1) 22 Q. B. D. 702, post, p. 187n. (2) [1906] A. C. 305.

to the mines lying under the less improvable parts of the said moors or commons and to those lying under the more improvable parts, and the question which I desire still to consider is whether in view of the application of that section to the mines under the less improvable parts of the moors or commons an inconsistency would not at once be created if there were introduced into it a clause to the effect that these mines must nevertheless be worked so as not to let down the surface. In so phrasing the question I am of course referring to that which the learned judge describes in his judgment as Lord Loreburn's test in the *Butterknowle Case*. (1) It is convenient to quote the Lord Chancellor's exact words. They are these (2): "If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down." Lord Loreburn, of course, intends to lay it down that the converse also is true. If such an introduction would create such an inconsistency then it means that the surface may be let down. Would the introduction of such a clause create that inconsistency in the present case, having regard to the special position of the surface of the less improvable parts as left by the Act. That is the question I now desire to consider.

The statute in the first paragraph of its preamble states that the large moors, commons or tracts of waste land within and parcel of the parish and manor of Lanchester contain together by estimation 20,000 acres or thereabouts, and then goes on to recite that the Bishop of Durham in right of his Church and See of Durham is lord of the manor of Lanchester and as such is seised of or entitled to the soil of and royalties within and under the moors, commons or tracts of waste lands. The statute then gives the names of the owners of hereditaments within the manor who with others not named in respect of or as appendant appurtenant or belonging to their said hereditaments are entitled "to have and enjoy right of

(1) [1906] A. C. 305. (2) Ibid. 309.

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common in upon and throughout *all* the said moors, commons or tracts of waste land." There is then a recital that the said moors, commons or tracts of waste land in their present state are of little use or service but that considerable parts thereof are capable of cultivation and improvement and that it would be of advantage to the Bishop and to the several persons entitled to the right of common aforesaid to have "the said moors commons or tracts of waste land divided and inclosed, and specific shares thereof allotted to them according to their several rights and interests therein." The preamble to the statute it will be observed while stating that considerable parts only of the moors commons or tracts of waste land are capable of cultivation and improvement foreshadows the division and inclosure and allotment of the whole of them, and the first operative section accordingly in terms provides that "All the moors or commons lying within and being part and parcel of the said parish and manor of Lanchester shall be divided set out and allotted by the Commissioners" thereby appointed "unto and amongst or for the benefit of the several persons having right of common thereon."

The distinction between the less and the more improvable parts of the moors and commons is first indicated in s. 19. By that section the Commissioners are required on or before May 12, 1775, or so soon after as conveniently may be in the first place to "set off ascertain and appoint such part or parts of the said moors or commons as shall" in their judgment "appear to be little capable of cultivation and improvement (so as the residue thereof to be divided allotted and inclosed by virtue of this Act shall not be less than 12,000 acres) which shall be divided and allotted and shall or may be accepted and enclosed upon such conditions as are hereinafter mentioned."

The details of that division and allotment of that residue—that is to say, of the more improvable parts of the moors or commons—are then prescribed, a rent of 4*d.* per acre being immediately made payable annually to the Bishop in respect thereof.

The directions as to the allotment of the less improvable parts of the moors or commons are contained in a later section of the Act, s. 50. By that section the Commissioners after they have set off ascertained and appointed such part or parts of the said moors or commons as shall in their judgment be little capable of cultivation and before they have prepared and made their general award are directed and empowered to set out mark ascertain divide and allot the same by proper stakes metes and land marks unto and amongst the Bishop and the several other persons having right of common upon the said moors or commons according to the rents or values of their respective estates having rights of common thereon in the same manner as had been prescribed with reference to the more improvable parts of the moors or commons and all such allotments are in like manner to be specified in the Commissioners' general award and in the plan to be made and annexed thereto. But with reference to these allotments the allottees are at liberty to accept and inclose their allotments at any time within twenty years next after the date and execution of the Commissioners' general award, they are under no obligation to accept them at all; from the date of acceptance only is any rent in respect of an allotment payable to the Bishop; and all such allotments are until acceptance and inclosure, and after the expiration of the said term of twenty years all such parts thereof as shall then remain unaccepted and uninclosed are for ever thereafter to "be deemed and adjudged to be part and parcel of the said moors and commons in their original state and as such shall or may be used and enjoyed by the several persons who are now entitled to right of common thereon . . . . anything hereinbefore contained to the contrary notwithstanding." The compensation clause, s. 48, is also illuminating in the present connection. That section recites the inconvenience and damage that may be done to particular persons "by reason of . . . . working the said mines and quarries within and under their respective allotments not only of the more improvable parts of the said moors or commons, but also of the less improvable parts thereof, after the same

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may be accepted and inclosed by virtue of this Act as hereinafter is directed and provided," but not before, and then proceeds to provide compensation for these persons. The directions for the preparation and as to the content of the general award and plan are given in s. 34 of the statute and those for its execution and deposit are contained in s. 35, and by s. 36 it is provided that from and immediately after its execution and deposit the award and plan and all matters and things therein contained shall be final and conclusive and "that all rights of common upon the more improvable parts of the said moors or commons which are so to be divided allotted and inclosed shall from thenceforth cease and be for ever extinguished, and that from and immediately after the accepting and inclosing of any allotment or allotments of the less improvable parts of the said moors or commons or of any part thereof according to the conditions and directions hereinafter prescribed and mentioned all right of common upon the grounds so accepted and inclosed shall cease and for ever be extinguished."

It is with reference to lands in the position just set forth that the powers reserved to the Bishop by s. 45 must be read inasmuch as that section relates to his mines and the working of his mines "lying and being within or under the said moors or commons intended to be allotted as aforesaid" —that is to say, to all his mines lying and being there; including it may be even the Roughside, Charlaw and Findon Hill Commons, notwithstanding the provision of s. 22 that the surface of these is not to be allotted by the Commissioners. I assume however in what follows that this section does not deal directly with these commons. It is safer so to do. Now there are some things about this section which are not, I think, open to serious doubt. First: Its provisions are amply extensive enough so far as the reasonable construction of language is concerned to include a power in the lord in the course of working his mines to let down the surface. In any instrument other than an Inclosure Act the language used would be sufficient for that purpose. The contrary was not, I think, seriously contested by Mr. Tomlin,

and *Beard* v. *Moira Colliery Co.* (1) is an authority in favour of that view. Secondly: The rights reserved to or conferred upon the lord by that section are reserved or conferred in respect of all his manorial minerals; these rights are equally extensive with regard to all of them and with reference to interference with all the surface above them; they are reserved as from the passing of the Act; their comprehensiveness at the beginning continues thereafter unabridged and unchanged. That which at the passing of the Act the lord may do anywhere with reference to the working of his minerals and the effect thereof on the surface he may do for all time and he may do it everywhere. The section, so far as language can make it so, is on this quite clear. But the section extends to and includes mines and the working of mines lying it may be under, according to the statement in the Act, of as many as 8000 acres out of the 20,000 acres included in it, with respect to the surface of which 8000 acres no allotment need have had any effect for twenty years; indeed no allotment need ever have been effective at all. With respect to all that surface the then existing right of common might not have been extinguished for twenty years; indeed it might never have been extinguished at any time. Further with reference to that same 8000 acres the Bishop might not for twenty years, or he might never receive any rent at all; and with reference to them before they are accepted there is no provision made for surface damage. They are so far excluded from the provision which is made.

Now why is it that as shown by the authorities the words of this section authorizing the Bishop and his successor to work the minerals and enjoy the property "as fully and freely as he or they might or could have had held used and enjoyed the same in case this Act had not been made" have attributed to them a restricted meaning when they are found in an Inclosure Act. An examination of the authorities will, I think, show—the matter is very succinctly dealt with in the judgment of this Court in *Beard* v. *Moira Colliery Co.* (1)—that that rule of construction so far as it exists rests upon the

(1) [1915] 1 Ch. 257, 267, 268.

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necessity of recognizing, if possible, the change in the commoners' interest effected by the inclosure, a view propounded possibly for the first time with distinctness by Lord Selborne in *Love* v. *Bell* (1), but applied since in many cases. There is, so far as I am aware, however, no authority—none certainly was quoted to us—for adopting that restricted construction in the case of powers as wide as are the powers here either where no such change has taken place, or in respect of a period where the surface rights enjoyed before the Act remain unaltered by the Act, and this observation brings me to the point which I desire to stress. Here we have a case in which 8000 acres out of 20,000 acres of surface under which the minerals lie might never have been enclosed at all: the rights of common over them might never have been extinguished. The existing right of the lord, if the Act had not passed, to let down the surface in the course of working the minerals under these 8000 acres, a sufficiency of pasture being left to the commoners, is conceded. Words amply sufficient to permit the continuance of such working are found in the Act. No change of interest in respect of that surface is necessarily effected by the Act. Any change if effected at all might be effected after an interval of as long as twenty years. Yet the rights in respect of the working of the minerals and the interference with the surface reserved by s. 45 are the same, neither more nor less, both with reference to these 8000 acres and with reference to the 12,000 acres; no distinction whatever is drawn between the two; and what these rights were at the beginning they were to remain to the end. From that point of view does it not follow, paraphrasing the words with which I commenced this inquiry, that the introduction into s. 45 of a clause to the effect that the mines must not be worked so as to let down the surface would create, first of all, an immediate inconsistency with the words of the Act so far as the rights of the lord in respect of the working of the minerals under the 8000 acres are concerned; and this done, does it not follow, on the frame of the clause itself, which in no way

1) 9 App. Cas. 286, 291, 292.

distinguishes between the lord's rights of enjoyment and working at one time as contrasted with another or at one place as contrasted with another, that the whole reservation must be given its full effect in accordance with the actual sense of the words employed, and that the introduction of such a clause would produce an inconsistency with reference not only to a part but, in the result, with reference to the whole of the surface ?

Even in cases under Inclosure Acts, as Lord Davey observed in the *Butterknowle Case* (1) : " the question for our decision must ultimately depend on the proper construction of the words of the statute." Lord Macnaghten in the same case observed (2) that the rule of construction adopted in *Love* v. *Bell* (3) had led the House to treat the words I have quoted as a dead letter for any practical purpose although these words would seem at first sight to be the keynote of the section. May it not be for the reason I have suggested that on the construction of this particular Act it is permissible and, if permissible, incumbent upon us to attribute to these words their natural signification ? It will not be forgotten that to such cases as *Duke of Buccleuch* v. *Wakefield* (4) there attaches, in Lord Westbury's words, " that irreversible and unchangeable quality that belongs to a decision of the House of Lords " (*Hills* v. *Evans* (5)) just as much as the same quality attaches to such cases as *Love* v. *Bell.* (3) To quote Lord Davey again (1) : " No doubt there is some difficulty in reconciling *Duke of Buccleuch* v. *Wakefield* (4) and *Love* v. *Bell* (3) ; but the words of the Acts in question are not the same, and Lord Selborne in the latter case was able to distinguish them." *Duke of Buccleuch* v. *Wakefield* (4) may once again become, for the purposes of this case, the governing authority if once it is established, as I suggest it may be, that what Lord Macnaghten (6) described as the refined and subtle distinctions which the noble and learned Lords who decided

(1) [1906] A. C. 305, 316.
(2) Ibid. 313, 314.
(3) 9 App. Cas. 286.
(4) L. R. 4 H. L. 377.
(5) 31 L. J. (Ch.) 457, 462.
(6) [1906] A. C. 305, 314.

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Love v. *Bell* (1) found between the *Duke of Buccleuch's Case* (2) and the case before them, cannot be applied to the present statute. The learned judge, treating *Ritson's Case* (3) as overruled, decided here in favour of the plaintiffs on the ground that this case was governed by the *Butterknowle Case* (4) notwithstanding the marked differences between the statutes in question in the two cases, differences to which attention was directed by Lord Atkinson in the *Butterknowle Case* (5) and in more detail by the learned judge himself. In other words he further extended the principle of the *Butterknowle Case* (5), accepting, I opine, the argument addressed to us by Mr. Tomlin in support of his judgment that in arriving at the meaning of an Inclosure Act with reference to any question of support for the surface ordinary principles of construction applicable to any other case go by the board. I have the gravest doubts whether, on any view of this case, it was permissible so to extend that principle. *Butterley Co.* v. *New Hucknall Colliery Co.* (6) seems to me to show that in the opinion of the House of Lords the *Butterknowle Case* (5) registered the limit in favour of the surface owner. That limit is not lightly to be extended. I rather suspect that if anything the inevitable reaction has set in. Be that as it may however, if that limit can only be extended to cover the present case by the application of such principles of construction as Mr. Tomlin contended for, then that step should only, I think, be taken by the House of Lords itself, and I cannot myself think of any Inclosure Act with reference to which the House of Lords could have a better opportunity of finally attempting once for all to settle this great controversy, so serious to the many interests concerned while it continues to rage, than the present statute now canvassed in a litigation in which all the surrounding circumstances at the date of its passing have been so carefully collected in evidence.

To sum up the whole matter. The learned judge decided

(1) 9 App. Cas. 286.
(2) L. R. 4 H. L. 377.
(3) 22 Q. B. D. 702, post, p. 187n.
(4) [1906] A. C. 305, 316.
(5) [1906] A. C. 305.
(6) [1910] A. C. 381.

this case in favour of the plaintiffs; because in his view the defendants here were defeated by the application of the principles laid down in the *Butterknowle Case.* (1) These observations of mine have been directed to show that the appellants here might well succeed by the application to the present statute of the very test set by Lord Loreburn in that case.

In my view the conclusion upon this case at which this Court has felt impelled to arrive deferring to authority binding upon it, might quite well have been reached on the construction of the Act itself apart altogether from the decision by which we are bound.

In my judgment this appeal should be allowed.

Appeal allowed.

Solicitor for plaintiffs: *Rider, Heaton, Meredith & Mills, for G. W. Jennings & Son, Bishop Auckland.*

Solicitors for defendants: *Rawle Johnstone & Co., for Cooper & Goodger, Newcastle-upon-Tyne.*

W. I. C.

NOTE.

[IN THE COURT OF APPEAL.]

CONSETT WATERWORKS COMPANY *v.* RITSON.

The material facts in this case are stated in the reports of the case in 22 Q. B. D., pp. 318 and 702. The following are the judgments which were delivered by the Court of Appeal (Lord Esher M.R., Lindley and Lopes L.JJ.), and are taken from the transcript of a shorthand note of those judgments printed in the Appendix to the Appeal to the House of Lords in the *Butterknowle Case.* (1)

LORD ESHER M.R. In this case the real question is whether the waterworks company is entitled to recover damages in respect of the surface of the land on which they built their reservoir having been let down by reason of the working of the mines underneath that surface or underneath the reservoir? Now, the land in question at one time belonged absolutely and in every respect to the Bishop of Durham, both as lord of the manor and as owner of the manor, subject only to a right of common on the part of certain commoners. At that time therefore the Bishop's rights, it is not denied,

(1) [1906] A. C. 305.

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were, with regard to the mines, absolute. He might have worked the mines in any way he thought right producing any effect upon that land that might be the result of what he thought right save only this, that he was obliged to leave out of the 30,000 acres a sufficient quantity for the exercise of the rights of common.

Under those circumstances, the Bishop of Durham of those days being one of the most powerful landowners and one of the most powerful persons in England, it was proposed that there should be an enclosure and an Inclosure Act was the result of agreement or arrangement between the parties. Therefore with the immense power of the Bishop, and with the then really known value of the mines in the county of Durham and more particularly in such a place as that under such common land as this was, one would be prepared to find that the Bishop with regard to the minerals would reserve the greatest possible power, that he would be very little inclined to give up any power with regard to the minerals that he had before: in other words that he would be inclined to reserve to himself the right of working the minerals as he thought right and without reference to the consequences to anything on the surface. One would be, I think, prepared for that.

Now, the right of common of the commoners was a certain right no doubt, and to a certain extent valuable, but I think it cannot be doubted when you think that there were 30,000 acres of land that were going to be enclosed practically they would if they got an ordinary Inclosure Act become owners of land instead of having a mere right to feed their cattle on the moor, and that they would get a thing very much more valuable to each of them who got it than this right of common was before. One would be prepared under those two views of the matter to find that the Bishop had reserved to himself as large rights as one can well imagine; and that the commoners would be willing to get something which was of much more value than their mere common right: but at the same time, no such absolute right as would prevent the Bishop from exercising his fullest rights, and most valuable rights as owner of the mine. One would expect, therefore, great power left to the Bishop, and a considerable limitation of the ordinary results of ownership would be left to the allottees. The Inclosure Act is passed and we have to construe it, and although much has been said about what would be the effect of the Inclosure Act, under the circumstances of the present times we have to construe that Act as we have so often said, as if we had to construe it a day after it was passed.

Now, these Inclosure Acts are not like a contract which may be casually made between individuals, they are unlike any other contract which has been made by anybody else. Inclosure Acts are of a common form which has existed for years.

Whenever you have such a common form as that where there have been decisions as to the mode of construing those Acts, it is not true, in my view, to say that the mode of construing them which has been adopted by a Court is not to be noticed by subsequent Courts.

When you have two casual agreements, one of which may never be repeated, the decision about the construction of it cannot give any help in construing another one which is different: but when you have documents which are ordinary documents—though not exactly alike—then the mode of construing them or any rule of construction, and although it is sometimes somewhat objected to, it is a word which I myself very much like, any canon of

construction applied to that species of document which is a common one, it seems to me the Courts would be doing wrong if after a canon of construction has been laid down with regard to such documents it should not be followed.

Now, has there been a rule of construction, or a mode in which you are, primarily or prima facie, to look at Inclosure Acts laid down? It seems to me there has been such a rule laid down; first of all in a Court of Appeal the equivalent Court to this Court and, therefore, any rule laid down by them would be binding upon us; but I think more, I think, that a rule laid down as a mode in which you are to look at these Inclosure Acts in the Court of Appeal has been adopted in the House of Lords, and you, therefore, have a rule of construction laid down with regard to these documents in the House of Lords and we are bound to follow that.

I take it, that no rule has been laid down to this effect, that where words are clear you are not to construe them according to their clear construction and obvious intention. But a rule has been laid down where there are words used in such documents, which are capable of one of two constructions, and I think that the rules laid down in the case of *Bell* v. *Love* (1) in the Court of Appeal have been adopted in the House of Lords. I take the rules laid down by my brother Lindley in the case of *Bell* v. *Love*. (1) It seems to me that the rules laid down by him in his judgment in that case, are rules which are adopted by Baggallay L.J. in his judgment in the same case, but I do not think that in his judgment you will find the rules laid down as rules of construction so obviously as they are by my brother Lindley.

Now, in *Bell* v. *Love* (2) my brother Lindley speaks of all the cases: *Rowbotham* v. *Wilson* (3); *Smith* v. *Darby* (4), which has been quoted to us; *Duke of Buccleuch* v. *Wakefield* (5) and *Hext* v. *Gill* (6) and others, and then he says: "These cases appear to me to establish two propositions, viz., first, that an Inclosure Act is not to be construed so as to allow the lord of the manor to let down the surface of allotments by working mines under them unless the language of the Act is clearly and unmistakably to that effect." There is a rule of construction: "It is not to be construed so as to allow the lord of the manor to let down the surface of allotments by working mines under them unless the language of the Act is clearly and unmistakably to that effect." Then his second rule is: "That the absence of all provision for compensation for injury sustained by letting down the surface tends strongly to indicate that the legislature did not intend by general words to reserve to or confer upon the lord of the manor the right to work his mines so as to let the surface down." That is a negative proposition that the absence of all provision tends strongly to show that the intention was that he was not to be allowed to let down the surface without paying for it.

Now it is clear that with regard to those two propositions neither of them negatives what I have said before, that if there were clear words giving to the lord the power to let down the surface without paying compensation, although there is no compensation at all given, the Court is bound to give effect to the clear words. That is quite consistent with both those propositions, but if the words are not clear to the effect that the lord can let down the

(1) (1883) 10 Q. B. D. 547.
(2) 10 Q. B. D. 547, 568, 569.
(3) (1860) 8 H. L. C. 348.
(4) (1872) L. R. 7 Q. B. 716.
(5) (1869) L. R. 4 H. L. 377.
(6) (1872) L. R. 7 Ch. 699.

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surface without paying compensation—if they are capable of two constructions—then this question of whether there is or is not compensation becomes a very material indication, that is, it becomes a very material context.

Now, recollect those propositions were laid down in *Bell* v. *Love* (1), in order to consider whether that case was governed by *Duke of Buccleuch* v. *Wakefield* (2) or not, and they were applied in this way: that although the words in *Bell* v. *Love* (1) were very large words, quite large enough to give to the lord the power of working the mines so as to let down the surface without paying compensation, yet it was consistent with them that he was not to let down the surface; and then the fact of there being no compensation to the person whose land, or to any persons whose land, was let down, authorised the Court or required the Court to say, that the generality of the words was to be construed, not in their larger sense, but in a limited sense. As it seems to me those rules were adopted by the House of Lords, and this question of the effect of the absence of compensation or the presence of compensation was distinctly alluded to by each of the noble Lords who gave judgment, very particularly by Lord Watson, when, alluding to the case of *Hext* v. *Gill* (3) he adopted and approved of what had been said by Mellish L.J. in *Hext* v. *Gill* (3), which was to this effect that in the *Duke of Buccleuch's Case* (2) in which, as has been pointed out by Mr. Rigby, the words were nearly as large as they could be, nearly as large as those which are here present to-day, but not quite so large that, although those words were so extremely large, yet he says if the Court in that case, or if the House of Lords in that case, had not found there was compensation, his view was that the decision would have been the other way, and that the words, although so large and in one sense so clear, would have been construed to a limited extent only. Lord Watson says: "I adopt that view of Mellish L.J." In my opinion the other judges in the House of Lords took the same view.

Now we must see how we are to apply the rules laid down in that case to the present. It is said here and argued by Mr. Rigby that even if there had been no compensation given in this case, the words used in s. 45 of the Act are so clear and so strong that even though there was no compensation given at all, they would show clearly that the Bishop had reserved to himself the right of working his mines so as to let down the surface without paying any compensation. It is true that the words are extremely strong. In the first place you have, without reading the whole of it the words that he reserves to himself: "All royalties, jurisdictions, matters, and things whatsoever to the said Manor or to the Lord thereof for the time being incident, belonging, or appertaining, other than and except such common right as could or might be claimed by him or them as owner or owners of the soil and inheritance of the said moors or commons, in as full, ample, and beneficial a manner, to all intents or purposes, as he or they could or might have held or enjoyed the same if this Act had not been made." Now if reliance were placed on those words alone, and there was no compensation clause, I think it has been held clearly that they must have a limited construction. But it goes on: "And also that the said Lord Bishop of Durham and his successors, and his and their lessee and lessees and assigns, shall and may from time to time, and at all times hereafter have, hold, work,

(1) 10 Q. B. D. 547. (2) L. R. 4 H. L. 377.
(3) L. R. 7 Ch. 699.

and enjoy all mines, minerals, and quarries, of what nature or kind soever, lying and being within or under the said moors or commons intended to be divided and allotted as aforesaid, together with all convenient and necessary ways" and so on, "or any part thereof, not only before but also at all times after the same shall be divided, in pursuance and by virtue of this Act, and full and free liberty at all times hereafter of making, laying, repairing, and using any new road" and so on, which shall be made, "and to do every other act which shall be necessary" and so on, and then of making pits and shafts, and a great many other things. Now, you come to the words "as fully and freely as he or they might or could have had, held, used, and enjoyed the same in case this Act had not been made." If the Act had not been made he could have done all those things without paying any compensation at all because he was the owner of the whole.

Now after the Act was made, the allottees had become freeholders, and unless we can find something in this to say that they are not to have the right to have the surface unmolested, they are to have it unmolested. Would those words, if they had stopped there, have been sufficient to take that away from these allottees, the owners of all the land except the mines? I myself hardly think so. They are to enjoy the same as if the Act had not been made, but it goes on "and that," that is, they are to have it in the same way as if the Act had not been passed "and that without paying any damages or making any satisfaction for so doing." That is to say, every thing which it is here said the Lord may do notwithstanding the property in the surface land, and I should say in all the land except the mines, having passed to the allottees so that they are become the legal owners of it, notwithstanding that, all these things which he is allowed to do, which he has reserved to himself the right to do, he may do as if the Act had not been made "and that without paying any damages or making any satisfaction for so doing."

Now there was considerable doubt at first whether those words applied to the whole of the section—whether both those last phrases applied to all the things in that section or only to a part of them, but when you come to the compensation sections they are introduced by a recital of what in the view of the Legislature the Legislature itself had just done by the preceding section. It is a recital by the Legislature of what they themselves said that they had already just done in the Act. What is it that they say? "And whereas great inconveniences may happen and damage be done to particular persons." What persons? Clearly the allottees, so that that is particular allottees, "by reason of searching for" that is one, "winning" that is another, "and working" that is another, "the said mines and quarries within and under their respective allottments."

Now there are two sets of allotments which they immediately specify—that is not only of the more improvable parts of the moor, but also of the less improvable parts of the moor. Then it is to be done to particular persons "by the said Lord Bishop of Durham and his successors without paying any damages or making any satisfaction for so doing." So that it is,—Whereas great inconveniences may happen by the Bishop doing these things without paying any damages or making any satisfaction for so doing. What are those things? Searching first, winning second, working third.

Therefore it is,—Whereas great inconveniences may happen and damage be done to particular allottees by working the mines and quarries without paying any damages or making any satisfaction for so doing.

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That is what the Legislature declares they have done by the section which they have just passed. How have they done that by that section? It can only be by these words that they may do these things as fully and freely as they might or could have had, held, used and enjoyed the same, in case this Act had not been passed, and that without paying any damage or making any satisfaction for so doing. That shows that the Legislature itself intended those Acts to apply to everything which is mentioned in s. 45, and among other things to the Bishop, owning, working, and enjoying all the mines. Therefore there is, by the Legislature, an interpretation of their own section which says that by s. 45 there was given to the Bishop a power to work the mines as if the Act had not been passed, that is to say: To work the mines as if he were still the owner of the whole, and that without paying any damage or making any satisfaction for so doing.

Now, if there were no compensation clause, would that be such an indication as would show that they intended that he might work the mines without paying anything for letting down the surface? I do not think it necessary to determine that question. I have great difficulty in saying that that would not of itself do without any compensation at all. I have great difficulty in saying that that is not so clear that, even if there had been no compensation at all given, that would not have shown that he might let down the surface, that is, work the mines, and in cases that have been pointed out during the argument all he would or might do under certain allotments would be to work the mines under them. It is said that at all events a most probable effect of working in that way would be to let down the surface if he worked them as he might have done, being the sole owner of the whole, that is, working them without leaving any props. If he did, that would let down the surface, and there it is plainly, that he is to work the mines and pay no compensation at all, that is, for working them and letting down the surface.

I should be inclined very much to say that this is strong enough without the compensation.

But then, you come to the compensation clause, and what do you find? You find that the Legislature has in respect of the working of the mines given compensation. It has given compensation for the working of the mines, but it is said it is not full compensation. Is it not what the Legislature has considered full compensation?

The Legislature says that for damage done by the working of the mines, which one would suppose naturally includes all damage done by the working of the mines, which I should say certainly includes the damage which is almost inevitably the only damage that can be done by merely working the mines, they have given a compensation.

When the Legislature gives compensation in respect of all that has been done, it seems to me that the Legislature meant that to be full compensation. If they give you compensation for only part of the damage that is done to you, that is not full compensation, but if they give you compensation for all the damage, whether you think that compensation is adequate or not, seems to me to be not the question. The Legislature has thought that that is full compensation, that is to say, it is compensation for the whole injury and that is full compensation. In this case, therefore, you have the words very strong indeed, almost strong enough to carry the matter without there being compensation, but certainly absolutely strong enough to carry it if you are to give them their natural interpretation, and the cases seem to me to show

that where there is compensation given, you are to construe the large words which precede that compensation, and which give powers to the original owner of the land, if there is compensation given in respect of what he is to do, in their ordinary sense. That seems to me to be the result of the judgment of the House of Lords in *Love* v. *Bell*. (1) The moment the fetter is taken away which is put upon the construction by reason of there being an absence of compensation, and there is compensation, you must go back and construe the words according to their ordinary and, therefore, their large signification, and that will oblige us here to say that the Bishop had reserved to himself, as I said might almost be naturally expected he would, considering his circumstances, and those of the commoners at the time at which this Act was passed, unlimited power of working his mines as he thought right.

Now, the case of *Love* v. *Bell* (1) seemed to me really an authority in favour of that construction, because the whole case was an effort, a strong effort, and in my judgment a right effort, adopted by the House of Lords to control the large words in that case by reason of there being no compensation clause. They construed what was some compensation to somebody to be no compensation whatever to the person whose land might have been affected by the working of the mines, and it is only because there was no compensation clause in that case, as they came to the conclusion that there was not, that they distinguished it from the *Duke of Buccleuch's Case*. (2) If that were the only thing which could distinguish it from the *Duke of Buccleuch's Case* (2), inasmuch as there is here a compensation clause, the reason for distinguishing *Love* v. *Bell* (1) from the *Duke of Buccleuch's Case* (2) has fallen to the ground. The case comes within the rule, therefore, which was applied in the *Duke of Buccleuch's Case* (2), that rule being, as I say, that the moment you find the compensation clause, the fetter which had been put upon the Courts, as to construing the large words, is taken away and you must construe the large words according to their ordinary effect.

That fetter is off here. We are bound to construe the words of s. 45 according to the ordinary meaning of the large words there used, and those large words enact and conclude this, that the Bishop had a right to work the mines so as to produce damage to the surface and so as to let down the surface and thereby injure any particular allottee, but that he was entitled to do that without paying any compensation whatever.

Therefore I cannot agree with the decision of the Divisional Court and I think that this appeal ought to be allowed and that our judgment ought to be the contrary of what was there given.

LINDLEY L.J. I have come to the same conclusion. The principles applicable to this case are those which were laid down in *Bell* v. *Love*. (3) That was three times argued and there was no difference of opinion between the judges before whom it came. It was first argued before Manisty J. and Williams J., and Manisty J. in a judgment which I recollect—I do not know whether it is reported—pointed out that upon the true construction of that Act there was no right to let down the surface of the allottees. The case was argued before this Court of Appeal, and when the arguments were finished time was taken to look into the authorities and the result of that will be found in the report of the judgment of this Court. (4) This Court took the

(1) 9 App. Cas. 286.
(2) L. R. 4 H. L. 377.
(3) 10 Q. B. D. 547; 9 App. Cas. 286.
(4) 10 Q. B. D. 547, 557–571.

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same view as Manisty J. that, upon the true construction of the Inclosure Act then before the Court, there was no right to let down the surface. Then the case went to the House of Lords. (1) The House of Lords took the same view, and so far as I can discover, adopted the same principle which had guided all of us. The cardinal principle is to put the true construction on the Act with which you have to deal. That of course is a very general proposition, and these Inclosure Acts have been examined and discussed so often that there may be said to be now some subordinate rules to assist one in arriving at a true construction; but after all, one must not lose sight of the fact that their true construction is what we must get at in each particular case.

Now in *Bell* v. *Love* (2) the case was very forcibly argued by the present Lord Herschell in this way.

The Inclosure Act there, was a Durham Inclosure Act. The manors belonged to the Dean and Chapter, and they were only valuable because of the minerals. The whole value of the land at the time of the enclosure rested in the minerals, the surface price was practically nil, and his contention was, and the contention which did not prevail was, that having regard to the rights of lords of manors in the north to a great mineral common like this, the rights of the lords were preserved even as against the allottees to the full extent to which they might have been exercised against the commoners. And whereas before that Inclosure Act the lords of the manor might have worked out all the minerals and let down the whole surface without making compensation to anybody, provided only they left common enough for the commoners, so it was argued that the lords of the manor had the right to work the minerals as against the allottees, and let the land down without making any compensation, because of the words in the Inclosure Act, "in as ample a manner" and so on as before. That was the argument addressed to the Court.

It was pointed out in answer to that that you cannot construe the words "in as ample a manner" in an Inclosure Act of that kind perfectly literally.

Before the Act the lord of the manor lets down the surface and makes no compensation. Why? Because nobody is injured, but the moment you come to allot the surface and he lets down the surface somebody is injured. That was the whole controversy. Is he then to make compensation to the allottees who are injured, or is he to be relieved from all liability to damage in that respect because of the words which I have mentioned? It was held by the Courts that notwithstanding those words "in as ample a manner" the lords of the manor would have no right to let down the surface of the allotments unless the right so to do could be found conferred upon him or expressly or necessarily implied in the Act of Parliament which authorized the inclosure.

Now in *Bell* v. *Love* (3) there was no possibility whatever of any intention to leave or to confer rights upon the lord of the manor or to preserve to him the right of letting down the surface without paying damage when damage was sustained, and the question is whether in this Act we can find any intention that that should be done? Now on looking through this Act, as of course one must from first to last, we have here certain provisions which

(1) 9 App. Cas. 286.
(2) 10 Q. B. D. 547.
(3) 10 Q. B. D. 547; 9 App. Cas. 286.

strike one at the outset as remarkable. We have here language which goes far beyond any Inclosure Act on which the Court acted in *Bell* v. *Love*. (1) We have here not only a mere reservation of mines in general words as in *Bell* v. *Love* (1); we have here not only the words "in as full and ample a manner as before," but we have the very striking words, "without paying any damage for what he may do in the exercise of the powers conferred upon him," and in order to remove any doubt as to the meaning of that very remarkable language, we have the preamble to the compensation clause which shows that the Legislature not only knew what it was about, but was thinking about what it was about. If we look at those two clauses, ss. 45 and 48, which are the governing clauses, there will be found an enumeration of rights conferred upon the lords of the manor. I say conferred, preserved, if you like, but they are nothing but general words. They are divisible into five groups. Passing over the reservation of the right to the lord to royalties which is immaterial, we first come to a group of words which relate to the working of the mines and the quarries. It is enacted by s. 45 that the Bishop of Durham, his successors and so on, "shall and may from time to time and at all times hereafter have, hold, work, and enjoy all mines, minerals, and quarries of what nature or kind soever, lying and being within or under the said moors" to be enclosed. That is a grant to him of the mines and minerals. The words "to have and to hold" are ample for the purpose. It is not implied but express. So there is an enactment that he is to be at liberty or have power to work and enjoy. Then follow a mass of words about convenient and necessary ways, and liberty to make roads and so on, and for that purpose to remove fences and obstructions and so on, and do every other thing which will be necessary to be done for the purposes aforesaid and of searching for, draining, winning, and working, the said mines and minerals. Those are one group.

Now, we come to another group which is much shorter and which relates to leading away the coals and minerals when got. Then there is a small group about making pits and putting up buildings and so on, and erecting fire engines and other engines and buildings. Then comes another group about removing the things he has put up, and then at the end come the words "as fully and freely as he or they might or could have had, held, used and enjoyed the same in case this Act had not been made, and that without paying any damages or making any satisfaction for so doing."

It appears to me perfectly impossible to read those words without seeing that what was meant was, and what the parties had present to their minds was, that the mines should be reserved to the Bishop and that he should be at liberty to work them and exercise all these powers which are there enumerated without paying any damage or making any satisfaction. How can it be said in the face of that that there is no implied power to let down the surface? I cannot conceive how these powers are to be exercised in a business point of view without risk at all events of letting down the surface.

Now, to remove all doubt about it, when we come to the compensation clause, s. 48, we find a very remarkable thing. We find it stated: "And whereas great inconveniences may happen and damage be done to particular persons by reason of searching for, winning, and working the said mines and quarries within and under their respective allotments" by the Bishop without

(1) 10 Q. B. D. 547 9 App. Cas. 286.

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paying any damage, the very thing is contemplated, the very inconveniences which may arise are foreseen and provided for, and it appears to me that we cannot, in the face of this Act, come to the conclusion that there is not an express and clear intention to confer upon the mineral owner the right to let down the surface in the course of working his mines, without paying any damage.

Mr. Wood has struggled with the words and asked us to hold that this is confined to damage short of letting down the surface—other damages, surface damages, by putting things on or taking things off, and so on. But I cannot so read the words. It is really impossible if you look at them. As a practical question it is impossible to see what damage you could do to the surface in the ordinary course of working a mine under it, except by letting it down.

You may in addition do other damage; you may put buildings or heaps of coal or waste and so on, but those are all additions which are expressly referred to. In addition to all that kind of damage, which may be done by removing fences and putting obstructions and things on the surface, there is the damage contemplated of injuring the allotments by working the mines under them. I do not know how in practice you can do that except by letting the surface down, and yet whatever the injury may be, however it may be caused, you are told here that the Bishop is to be at liberty to do it without paying any damage for so doing. It is impossible, I think, to say, in the face of language so clear as this, that the Legislature never thought about surface support. It may be true, and my own impression is that it is true, that nobody contemplated when this Act of Parliament was passed that there would be any building to any great extent over these moors. For anything I know, there is not now. I do not know how that may be. It may be true that they never thought of the consequences of erecting houses, but that they did think about the consequence of letting down the surface is plain from the language used.

Now, if we pass on we find this, that having contemplated the letting down of the surface and having contemplated the great inconveniences which may arise, not necessarily, but which may arise, in case the surface is let down and damage sustained, the Act of Parliament goes on to provide a particular method of compensation for such damage, and speaking roughly the method is this: There is a minimum of 300 acres and a maximum of 500 acres to be reserved by the Inclosure Commissioners. Those acres are to be vested in the justices. They are to have liberty to let the land so allotted to them, and out of the rents they are to pay compensation, and then if those rents are insufficient in any one year there is to be a rate upon all the allottees to make up what is wanted for the purpose of compensating those to whom damage has been done. That is the theory and scope of the Act. Whether that compensation clause is adequate, if you happen to have land covered with buildings, I do not know. I should think not, and it may be that the compensation clause is deficient in that respect. That is possible. I do not know how that may be at all, but be that as it may, what we have to get at is this, to see whether the Legislature did reserve to the Bishop or confer upon him the right to let down the surface without paying any damages for so doing.

It appears to me, I confess, in the face of this language, impossible to deny that the Legislature has clearly conferred that upon him. That disposes of this case. I am unable to agree with the view taken by the Court below.

I think Cave J. did not attach sufficient weight to what lords of the manor can do with respect to minerals, and I think A. L. Smith J. has attached too much importance to the fact, if it be a fact, that the compensation clause is inadequate to provide for cases which were never foreseen. It seems to have been amply adequate to provide for cases which were contemplated, that is to say, the letting down of the surface whilst the land was agricultural land. It may be that it is unjust or will work roughly, and perhaps harshly, when you come to apply it to cases if there be such in which these allotments are covered with buildings. I do not know how that may be. It does not affect the question about letting down the surface. In *Bell* v. *Love* (1) there was no indication of intention that the surface should be let down without paying for the damage. Here the language is that it may be let down without paying any damages for so doing.

LOPES L.J. I quite agree with an observation which has just fallen from my brother Lindley, namely, that I do not think Cave J. attached sufficient importance to what are and were the rights of a lord of the manor, and it seems to me in this case very material to consider what the position of the Lord Bishop of Durham was before this Act was passed. He was the lord of the manor in which these 30,000 acres of common existed. There were a certain number of commoners who had limited rights of pasture over that common, but the soil in that common belonged absolutely to the Lord Bishop. The mines and minerals in that common belonged absolutely to the Lord Bishop, and he had a right to win and work the mines under these 30,000 acres, and to let down the surface to any extent he thought fit, provided only he left a sufficiency of pasture for the commoners. Now, that was the position of things before the passing of this Act. What the rights of the different parties were after the passing of this Act, depends entirely on the meaning of the Act, and especially so far as this case is concerned on the meaning of the provisions that are contained in ss. 45 and 48 of the Act.

Now, it is said by the appellants that a right is conferred on the Bishop to let down the soil, to remove the support of the subjacent soil. It is said, on the other hand, on the part of the respondents, that the only right which is conferred is a right to interfere with the surface, in no way a right to let down the soil.

Now, it is perfectly clear law that the burden of making out a right to let down the surface lies here upon the appellant. Unless he can make out that right clearly, the presumption is that the allottees, the owners of the freehold, have a right to the support of the subjacent soil. Now to remove this presumption and make out this right to let down the subjacent soil, the language must be unequivocal, whether it is used in an agreement or deed or Act of Parliament. Here we have to deal with an Act of Parliament and, if the language of this Act of Parliament is definite and unequivocal, I take it there is an end of the question. I mean if it is clear and definite in this way, that the right to let down the soil was intended to be conferred, then the presumption is gone, and the right to let down that soil is beyond all question. Again, if the language in the Act of Parliament is large and general, and there is nothing in the context to confine and point to anything, then the presumption of the right to support prevails. If, on the other hand, the context indicates a right to let down the surface and indicates that that

(1) 10 Q. B. D. 547; 9 App. Cas. 286.

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right was intended, then effect is to be given to the general words, and the presumption would be negatived. To my mind the language of this Act of Parliament is clear and unequivocal, and I should be inclined to hold myself that if there had been no compensation clause, the language would have been sufficiently clear to have authorized the letting down of the soil. The words of s. 45 have been already referred to, so I shall only refer to them very shortly. The material words are these: the said Lord Bishop of Durham "shall and may from time to time and at all times hereafter have, hold, work and enjoy all mines minerals and quarries of what nature or kind soever lying and being within or under the said moors or commons intended to be divided." Then follow a large number of privileges and powers, about which I shall have to say a word presently, and then the section takes up the words "mines, minerals and quarries" in this way "as fully and freely as he or they might or could have had, held, used, and enjoyed the same in case this Act had not been made, and that without paying any damages or making any satisfaction for so doing." I venture to say if this had not been an Act of Parliament, or if it had not been some legal language, about which there are cases more or less bearing upon that language, no human being could have for a moment doubted what it was intended by the Bishop to reserve in this case "as fully and freely as he or they might or could have had, held, used or enjoyed the same in case this Act had not been made, and that without paying any damages or making any satisfaction for so doing." Before the Act was passed, as I have already said, he had a perfect right to let down the soil to any extent, provided he left sufficient for the commoners. Then, not only does it say that in case this Act had not been passed, and that without paying any damages or making any satisfaction for so doing, but it seems to me that the ordinary clear and proper meaning to put upon those words is that he was to be at liberty, after the passing of this Act, to work these mines and let down the surface in so doing, and that without making any compensation to the persons who were injured.

But the case does not stop there, because when you come to the compensation clause the construction which I have put on the words in s. 45 seems to me to be accentuated and emphasized: "And whereas great inconveniences may happen and damage be done to particular persons by reason of searching for, winning and working the said mines and quarries within and under their respective allotments, not only of the more improvable parts of the said moors or commons, but also of the less improvable parts thereof, after the same may be accepted and inclosed, by virtue of this Act as hereinafter is directed and provided, by the said Lord Bishop of Durham and his successors, and his and their lessee and lessees and assigns, without paying any damages or making any satisfaction for so doing: for remedy whereof be it enacted" What? That upon complaint and application of any person or persons who may be damnified by the working of the mines, and so on. Be damnified by what? By the working of the mines. It is very difficult to understand how those mines could be effectually worked without a letting down of the surface. At any rate it seems to me that a letting down of the surface was contemplated and was intended by this Act of Parliament.

With regard to the case of *Love* v. *Bell* (1) to my mind that case is entirely distinct from the present. As has been pointed out by my brother Lindley,

(1) 10 Q. B. D. 547; 9 App. Cas. 286.

the language of the Act of Parliament is different. We find there no such words as "and that without making any satisfaction or compensation." We find there, moreover, a compensation clause very different from the compensation clause in this case—a compensation provided to the occupants in respect, it was thought, and rightly thought I think in that case, of not a permanent but a temporary damage. Here on the other hand, the compensation, if the construction I place upon the Act is the correct one, is not only in respect of the temporary damage but of permanent damage, namely, damage in letting down the surface.

It may be said, of course, that the compensation provided by this Act of Parliament is inadequate. However, that it appears to me is nothing with which this Court has to do, nor am I prepared to say that, having regard to the state of things at the time of the passing of the Act, it was inadequate, because it seems to me that it was never then contemplated that large portions, if any portions of this moor, would be used for the purpose of having buildings erected upon it, but rather it was thought, I should think, that it would be used for grazing purposes, subject to the rights of mining which are so amply reserved in the Act of Parliament contemplating, as I have no doubt, the letting down of the surface. I think, therefore, this appeal should be allowed.

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[1921. Y. 683.]

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[1921. Y. 684.]

Vendor and Purchaser—Sale of Land—Open Contract—Public Right of Way—Latent Defect—Cancellation of Contract.

Where there runs across land an unmetalled open track of a character that is compatible with the existence of a public or private right of way or of a mere accommodation track for the use of persons entitled to the land and there is in fact a public right of way along the track, it does not constitute a patent defect so that a decree for specific performance can be obtained against a purchaser of the land under an open contract.

It is not enough that there exists on the land an object of sense that might put a careful purchaser on inquiry. In order to be a patent defect, the defect must either be visible to the eye, or arise by necessary implication from something visible to the eye.

Bowles v. *Round* (1800) 5 Ves. 508 discussed and explained.

Ashburner v. *Sewell* [1891] 3 Ch. 405 applied.

WITNESS ACTION.

On March 30, 1921, the plaintiff in the second action, Frederick Thomas Young, agreed in writing to sell and the

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defendant to purchase a field called South Hill situate at Somerton, Somersetshire, for the sum of 250*l.* and 10*l.* for timber. On April 7, 1921, the plaintiff Young as agent for the plaintiffs in the first action, Yandle & Sons, agreed in writing to sell and the defendant to purchase a plantation called Harding's Stile Plantation immediately to the south of the field, South Hill, for the sum of 100*l.* Both agreements were open contracts.

There was a public right of way across both the field and plantation starting from a public highway at a heavy iron gate at the north-east corner of South Hill and crossing diagonally to the south-west corner of Harding's Stile Plantation. The right of way was over an unmetalled and somewhat irregular track, and where it left South Hill and entered Harding's Stile Plantation there was a stone stile. When the path left Harding's Stile Plantation at the south-west corner it continued over some adjoining fields and ultimately emerged on to another highway.

Subsequently the defendant declined to complete either of the contracts on the ground that the public right of way was a defect in the titles of the plaintiffs in both actions. In these circumstances plaintiffs commenced these actions claiming specific performance and damages.

On March 30, before entering into either of the contracts, the defendant inspected the property in the company of the plaintiff Young. The plaintiffs alleged by their statements of claim, first, that the right of way was obvious to any one on inspection; and, secondly, that on March 30 the plaintiff Young drew the defendant's attention to the right of way and the defendant then expressed himself as satisfied. The defendant denied both these allegations and counterclaimed for cancellation of the contract and the return of 35*l.* paid to the plaintiff Young, as to 25*l.* by way of deposit and as to 10*l.* for the timber.

On the evidence Sargant J. came to the conclusion that the plaintiff Young had not drawn the defendant's attention to the right of way on March 30. The case is only reported

on the question whether the right of way was a latent or patent defect, and the effect of the evidence in this connection sufficiently appears from the judgment.

A. Grant K.C. and *Russell Gilbert* for the plaintiffs. The pathway is shown by dotted lines on the Ordnance Survey map and is apparent to the eye. The public right of way on it was therefore a patent defect. There was a sufficient indication to put the purchaser on his inquiry and therefore the defect was not latent: *Bowles* v. *Round.* (1) It is not a case like *Shepherd* v. *Croft* (2), where the defect could only be seen by looking into a hole in the ground. The law is that on an open contract the obligation to make a good title to the unencumbered fee simple may be rebutted by proving that the purchaser entered into the contract with knowledge of certain defects: *McGrory* v. *Alderdale Estate Co.* (3); and the purchaser must be treated as having this knowledge if there was sufficient to put him on his inquiry: see as an example of a patent defect *Dyer* v. *Hargrave.* (4)

Greene K.C. and *Warwick Draper* for the defendant. It is immaterial that the right of way is indicated by dotted lines on the Ordnance Survey map in view of the statement on the map that the indication of such a track is no proof that there is a right of way over it. The indication of the track on a plan shown by the plaintiffs to the defendant would not make the right of way one subject to which the defendant agreed to take: *Ashburner* v. *Sewell.* (5) The test whether a defect is patent is not whether the purchaser had notice sufficient to put him upon his inquiry. A patent defect must speak for itself. It must be obvious that there is a right of way enjoyed by some third person. *Bowles* v. *Round* (1) is insufficiently reported and must not be taken to establish that the test is whether the purchaser is put on his inquiry. For a footpath to be a patent defect it must

(1) 5 Ves. 508.
(2) [1911] 1 Ch. 521, 528.
(3) [1918] A. C. 503, 508.
(4) (1805) 10 Ves. 505.
(5) [1891] 3 Ch. 405, 408.

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be such that it must be inferred from the mere sight of it that it is a public highway : see Dart's Vendor and Purchaser, 7th ed., vol. i., p. 99, and Fry on Specific Performance, 6th ed., p. 406. The physical indication of a track, without anything to show that the public use it, does not constitute a patent defect. It might be different if there was a metalled path enclosed on either side, but here there is nothing but an irregular track shut off from the road by a heavy iron gate. The existence of such a track need involve no more than that the owners of the field and plantation had given each other rights of way over their respective properties. This to a purchaser of both field and plantation would be immaterial. The defect therefore was latent and its non-disclosure is a sufficient ground to entitle the defendant to rescission of these open contracts.

A. Grant K.C. in reply. In *Ashburner* v. *Sewell* (1) the existence of a latent defect was admitted on both sides. The existence of a track over the property agreed to be sold leading into other property suffices to warn the purchaser that he is not acquiring the unencumbered freehold and puts him upon his inquiry. The defendant cannot rely on the existence of this public right of way as a defect in title, if he knew or ought as a reasonable man to have known that he was not buying the unencumbered freehold. The track running over the land on to other land gave him notice and put him on his inquiry and this is all that is required : Fry on Specific Performance, 6th ed., p. 405. Though shortly reported *Bowles* v. *Round* (2) is authoritative and directly in point. There was in that case an open footpath and nothing more than here to suggest the existence of a public right of way ; but the Lord Chancellor said : "I cannot help the carelessness of the purchaser, who does not choose to inquire. It is not a latent defect." This is irreconcilable with the contention that a patent defect must speak for itself. An additional element to put the purchaser on his inquiry was that there was a notice visible from the track asking people to keep to the path. The test is

(1) [1891] 3 Ch. 405, 408. (2) 5 Ves. 508.

whether there was sufficient to put the defendant on his inquiry: *Shackleton* v. *Sutcliffe* (1); *Dyer* v. *Hargrave* (2); *Denny* v. *Hancock*. (3)

SARGANT J. These are two actions which have been tried together. The defendant is the same in both actions. He is sued by Mr. Young, who is the owner of a field called South Hill, situate at Somerton, in the county of Somerset, in respect of an agreement to purchase the field for 250*l*. plus 10*l*. for timber. He is also sued by Messrs. Yandle & Sons, who are timber merchants, in respect of an agreement made at about the same time, to purchase a copse or plantation called Harding's Stile Plantation, which lies to the south of Mr. Young's field, and is separated from the high road by Mr. Young's field. That contract was a contract to purchase the plantation for 100*l*.

The substantial defence is that the field and plantation were bought together for the purpose of being used by the defendant as a site for a residence which he was intending to build; and that there is running across the field and the plantation a public footpath. Of course, if there was no knowledge at all on the part of the defendant of the existence of the public footpath, that would be a good objection to the title. No one who buys the unencumbered fee simple of a piece of land can have forced on him land which is subject to a public right of way.

What is said on behalf of the vendors is, first, that the public right of way was expressly pointed out to the defendant, Mr. Sutton, by Mr. Young, who acted as vendor on his own account, in respect of the field, and as agent of Messrs. Yandle & Sons in respect of the plantation. It is said that it was expressly pointed out to the defendant on the occasion of his visit to the property when he agreed to buy it. Secondly it is said that even if that were not so, yet inasmuch as there is in existence over the field and plantation a defined track, reaching in the case of the field from an iron gate on

(1) (1847) 1 De G. & Sm. 609. (2) 10 Ves. 505.
(3) (1870) L. R. 6 Ch. 1.

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the north to a stone stile on the south; and reaching in the case of the plantation from the stone stile which is on the north of the plantation to the south of the plantation, the right of way constitutes a patent defect subject to which the purchaser takes. Of course, it is undoubted that in the case of a patent defect the rule caveat emptor applies. The purchaser takes that which he sees, and is not entitled to have anything better than that which he sees.

[His Lordship then examined the evidence with regard to the first question whether the right of way was expressly pointed out to the defendant, and decided that he must deal with the case upon the footing that there was no express mention to the purchaser of the existence of this public right of way, either over the field or over the plantation at the back of the field.]

I come now to a more difficult question, one of mixed fact and law. The question is this: Was there such a physical indication of the existence of a public right of way over the field and plantation as amounted to a patent defect—that is, a defect obvious to the purchaser at the time of his purchase? On that point the evidence is that there was across the field a definite track or path, not a metalled track but a worn track across the grass, not a very regular track but still a track sufficient to call the attention of anybody who looked with ordinary care at the field to the fact that persons were in the habit of passing in a defined line from the iron gate on the north down to the stone stile on the south. A great deal has been made of the existence of certain other tracks, which were caused by the carting of timber, which had been felled by Messrs. Yandle & Sons after they bought the plantation; but I do not think much importance can be attributed to those tracks. They did not coincide with the path for any great distance from the gate at the north end of the property, and I do not think that the main length of the path was in any way obscured by, interfered with, or contiguous to, the cart tracks which had been made in hauling timber from the plantation.

The evidence is that on March 30 Mr. and Mrs. Sutton

were driven over the field, but they were then looking at the surrounding scenery rather than considering the desirability of the field as a site for the house. They were not paying any special attention to the field itself. When they came to the southern end of the field they left their vehicle and strolled off towards the eastern portion of the field. Then Mrs. Sutton came back and walked west, returning near to the place where they had been deposited. Then she came to the stone stile, and after sitting on it for a little, she managed with some little difficulty to get over it, and went into the plantation. She says that at the time there was nothing to indicate a path in the plantation at all, and, accordingly, that she did not realize that there was a path there. I think that in this she is probably mistaken to some extent. It is quite clear from the evidence that has been given that about twenty days later there was a fairly well defined track through the plantation. I think it improbable that she would have got over into the plantation and walked some yards into it if there had been merely cut brushwood and brambles, and stuff of that sort, lying about in the plantation, without any sort of path. I find as matter of fact that on March 30, the date of the visit, as well as on subsequent dates, which however are not material except for the purpose of determining the conditions on March 30, there was a fairly well defined track through the plantation. Therefore both in the case of the field and in the case of the plantation, there was a pathway or track visible, such as would indicate that the track was used by a number of persons from time to time. That in my view was the position, and I am fortified in my conclusion by the fact that on the Ordnance map a defined track is shown by dotted lines over the field and plantation. That there is in fact a track there, must, I think, be taken as an established fact; but it is not anything in the nature of a metalled track. It is the sort of track which might have been formed by quite a small number of persons using it from time to time. In point of fact, however, it is admitted on both sides that the track is formed by the public in the exercise of a public right of way.

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The question is whether the physical existence of that track across those two pieces of land amounted to a patent defect indicating to the purchaser that he was buying two pieces of land which were subject to a public right of way. With regard to that, there is some general authority, and one case which seems to me to be a special authority almost entirely covering this point. The first general authority is *Bowles* v. *Round* (1), a decision of Lord Loughborough. There certain objections had been made by the defendant in the case and the object of the bill was to obtain specific performance of an agreement entered into by the defendant to purchase a meadow called Burnett's Meadow near Clewer. The first objection, which is the only one I need refer to here, was this: "That the premises were described as a meadow, consisting of 15 acres, without any notice of a way round, and a footpath, across it." The Lord Chancellor said: "Certainly the meadow is very much the worse for a road going through it; but I cannot help the carelessness of the purchaser, who does not choose to inquire. It is not a latent defect." The report is a very short one. Nothing is said as to the physical condition of the road in question in that case. It looks to me as if the road was on the face of it a public road. If that be so, the decision was obviously the only possible decision that could be arrived at. I think that if there had been merely a track, and the question had arisen whether the track indicated the existence of a road over which the public had rights, or only indicated the existence either of a private right of way or of a track used by the owner of the land alone, the Lord Chancellor would have dealt with the point, and would have examined the conditions of the property as presented to him in the evidence; and he would have founded his judgment on the result of that examination. I have also been referred to *Shackleton* v. *Sutcliffe*. (2) I do not think that case is of any real assistance here, as the facts were quite different. The question was with regard to the right to have water supplied from an upper meadow to a lower meadow. I think the facts are

(1) 5 Ves. 508. (2) 1 De G. & Sm. 609.

too different from the facts of this case for it to be of any real assistance; and there is no general statement of the law in it which appears to me to be of much use for the present purpose.

But there has been a much more recent case, *Ashburner* v. *Sewell* (1), which came before Chitty J. That case raised the question whether the vendor had the right to rescind the contract, or whether the purchaser was entitled to compensation. It turned on the existence of a road over the property. There is no doubt whatever that the purchaser at the time of the purchase knew of the physical existence of the footpath or road, because Chitty J. said in his judgment (1): "The plan is of a house and garden coloured red and of a field coloured green, and the road, over which, as it now appears, strangers have a right, is actually delineated. There are dotted lines on the plan which indicate that there is a road there on that part of the surface of the earth; but they do not indicate that any third person has a right to pass along such road. Neither the plan nor the schedule shows the existence of any right of way." Then he says this: "The general rule of law in regard to rights of way may be stated as follows: where it is obvious that there is a right of way enjoyed by some third person, or by the public in general, the existence of such right of way cannot give rise to any objection to the title, as, for example, if the estate sold is a large one with a public highway running through it, then it is obvious that it is not intended to sell the property free from such right of way; but the purchaser would take subject to the right of way. The right is in such a case patent as opposed to the term 'latent,' as used by Lord Loughborough in the case of *Bowles* v. *Round* (2), where he said that the road going through a meadow was not a 'latent defect.' In the case before me there is, as both sides have admitted, a 'latent defect,' the right of way being unknown to both vendor and purchaser, and the question is whether the existence of this latent right of way is a matter which falls within clause 6. I am of opinion that it does."

(1) [1891] 3 Ch. 405, 408. (2) 5 Ves. 508.

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That was a clause giving the vendor the right to rescind in the case of any objection to the title as distinct from another clause which gave compensation.

It seems to me that this decision is of great assistance in the present case; and indeed governs it, having regard to the view I take of the facts. It is to be remarked that the pathway or track is in itself no defect at all. The only defect is that which is, or may be, implied from the existence of the path or track. If the path or track is one which is formed merely by those who are in the employment of the owner of the land, then, of course, there is nothing to prevent the owner of the land from giving a full title to any one else; and, therefore, it is wrong to speak, in the case of an objection founded on the existence of a public right of way, of the mere physical existence of the track as being a patent defect. It is not defect at all in itself. It is, or may be, a defect only as indicating the existence of rights in other persons. Of course, the physical conditions of the path itself may be such as necessarily to indicate that there is a public highway, a highway over which the public have rights. If it were such as necessarily to indicate that to anybody who saw it, then the purchaser, who bought the property after having seen it, would necessarily be bound to take it subject to that patent right; but if the track were not of such a nature as to indicate that there must necessarily be a right of way over it, then the case is otherwise. In such a case the purchaser, not having been brought face to face with a patent defect, but only seeing something which may or may not indicate the existence of rights in others, is not bound to take the property subject to a public or private right of way, if it exists and is of such a nature as to be a fundamental objection to the property.

Mr. Grant relied on a passage in Chitty J.'s judgment in *Ashburner* v. *Sewell* (1): "Where it is obvious that there is a right of way enjoyed by some third person, or by the public in general, the existence of such right of way cannot give rise to any objection to the title." I think the

(1) [1891] 3 Ch. 405, 408.

learned judge did not mean there to say that if in any case it were obvious that there was at the least a private right of way, no objection could be taken by the purchaser, if in fact it turned out afterwards that there was not a private but a public right of way. I think he is only considering cases where the actual existence of a private or public right of way, as the case may be, is obvious to the purchaser from the condition of the property. It may very well be that if the physical condition of the property were such as necessarily to indicate at least a private right of way, but not such as necessarily to indicate a public right of way, then a purchaser who discovered after his purchase that there was a public right of way over the property might, if such public right of way was distinctly more onerous than a private right of way, as is often the case, be entitled to rescind, or at any rate to resist specific performance of his contract.

In the present case I have come to the conclusion that not only is there not necessarily an indication of the existence of a public right of way over the field and plantation, but that there is not even a necessary indication of the existence of a private right of way. I think there is one very excellent indication of this. It so happens that the field and plantation are now in different ownership. They were until quite recently in the same ownership and formed part of a considerable estate of Lord Ilchester, which had been put up for sale by auction a year or two previously. When Messrs. Yandle & Sons' solicitors, Carne Hill & Wedd, desired to find out particulars with regard to the footpath, they wrote to the agents of Lord Ilchester, and after pointing out that a footpath was shown on the plan inquired: "Can you tell us whether this is a public path or a private one used by the gamekeeper only?" It is clear that they, at any rate, thought that neither the existence of dotted lines on the plan nor the physical condition of the property was a necessary indication that there was a public right of way, or even a private right of way, over this property. At the north end of the field the path is approached by a gate which is difficult to open, and at the south end of the field there is a stone stile

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which is from 2ft. 6in. to 3ft. high and has apparently a stone about 6in. high on its north side but no similar stone on the other side; and although there is some indication of public user, it seems to me extremely slight. The stile might have been put there merely to facilitate the passage of the gamekeeper on his rounds, or as a convenience for shooting parties. The whole circumstances seem to me to be compatible with the existence of a public right of way, a private right of way, or an accommodation track for the use of persons entitled either to other parts of the property, or to those two fields.

There is a general observation that I should like to make in conclusion. In all these cases between vendor and purchaser, the vendor knows what the property is, and what the rights with regard to it are. The purchaser is generally in the dark. I think, therefore, that, in considering what is a latent defect and what a patent defect, one ought to take the general view, that a patent defect, which can be thrust upon the purchaser, must be a defect which arises either to the eye, or by necessary implication from something which is visible to the eye. It would not be fair to hold that a purchaser is to be subjected to all the rights which he might have found out, if he had pursued an inquiry based upon that which was presented to his eye. I think he is only liable to take the property subject to those defects which are patent to the eye, including those defects which are a necessary consequence of something which is patent to the eye.

In the circumstances both the actions must be dismissed, and the defendant is entitled in both actions to judgment on his counterclaim.

Solicitors: *Hancock & Willis, for Carne Hill & Wedd, Langport, Somerset; Peacock & Goddard, for Trevanion, Curtis & Ridley, Bournemouth.*

H. C. G.

In re DAVID ALLESTER, LIMITED.

ASTBURY J.

1922

May 2, 3.

[00203 of 1921.]

Company—Mortgages—Registration—Pledge of Bills of Lading—Redelivery to Company for Realization on Pledgee's behalf—Letter of Trust to that effect —Registrability—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 93, *sub-s.* 1 (*c*) (*e*)—*Bills of Sale Act*, 1878 (41 *&* 42 *Vict. c.* 31), *s.* 4.

A limited company pledged bills of lading with a bank to secure an overdraft. When it was time to sell the goods, the company in accordance with the well established mercantile practice obtained the bills of lading from the bank for realization on the terms stated in the usual letter of trust given by the company to the bank, to wit that the company received the bills of lading in trust on the bank's account and undertook to hold the goods when received and the proceeds when sold as the bank's trustees and to remit the entire net proceeds as realized:—

Held, that as the letter of trust merely recorded the terms on which the company was authorized to realize the goods on the bank's behalf, and did not really create any charge at all, it did not require registration under s. 93, sub-s. 1 (*c*), (*e*), of the Companies (Consolidation) Act, 1908, either as a bill of sale within clause (*c*) or a charge on book debts within clause (*e*).

In the first place it was not a bill of sale at all within the definition of s. 4 of the Bills of Sale Act, 1878, and (*semble*) if it had been so, it would on the evidence have been a document "used in the ordinary course of business" within the exception in that definition.

Ex parte Hubbard (1886) 17 Q. B. D. 690 and *In re Hamilton Young & Co.* [1905] 2 K. B. 772 applied.

Dublin City Distillery, Ld. v. *Doherty* [1914] A. C. 823 distinguished.

In any case the bank's previous rights as pledgee remained unaffected by this common and convenient mode of realization.

North Western Bank v. *Poynter* [1895] A. C. 56 applied.

Secondly, the letter of trust was in no sense a charge on the company's book debts.

Ladenburg v. *Goodwin, Ferreira & Co.* [1912] 3 K. B. 275 distinguished.

SUMMONS.

The above company (now in liquidation) had carried on the business of wholesale seed merchants. In connection with this business it constantly borrowed money from Barclays Bank, among others, by way of overdraft, depositing as security from time to time the bill of lading and other documents of title to seed which it had bought for resale, generally from abroad.

When the company was in a position to sell the seed so

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pledged with the bank it communicated with the bank to that effect and in accordance with the well-established mercantile practice in these transactions obtained the invoice, bill of lading and copy of insurance policy for realization on the terms stated in the ordinary letter of trust of which the following is an example :—

"*February* 1, 1921.

"To BARCLAYS BANK, LIMITED.

"GENTLEMEN,

"I/we have to acknowledge receipt of invoice, bill of lading, and copy of insurance policy representing :—100 bags alsike and white clover, loan 271, January 11, 1921.

"I/we receive the above in trust on your account, and I/we undertake to hold the goods when received, and their proceeds when sold as your trustees. I/we further undertake to keep this transaction separate from any other and to remit you direct the entire net proceeds as realized, but not less than 1200*l.* within 28 days from this date.

"I/we undertake to cover the goods by insurance against fire and to hold the policy or policies on your behalf.

Yours faithfully,

For and on behalf of David Allester, Ld.

HENRY F. MILLS, *Secretary.*"

The loan in the above instance was 1200*l.*, but at the date of the liquidation—namely, February 25, 1921, several of these documents were outstanding, the goods not having been sold, or the proceeds not having reached the bank.

The question therefore arose whether the bank was entitled to priority in respect of its claims for (*a*) the full amount of the proceeds of sale of goods pledged to the bank by the company before the liquidation and released by the bank for sale by the company or (*b*) the amount of moneys standing to the credit of the company or the liquidator in any bank representing those proceeds of sale.

On July 19, 1921, the liquidator issued this summons to determine these points.

Business experts on behalf of the bank proved that the custom or practice whereby goods pledged with a bank wer-

released for purposes of sale under a letter of trust was very well known and generally adopted and made use of in banking business. It had been in existence for twenty years and upwards and during that period the letters of trust had always been considered and treated as being documents used in the ordinary course of business as proof of the possession or control of goods and accordingly excepted from the operation of the Bills of Sale Acts, and an enormous number of transactions had been carried out by banks on that basis.

Clauson K.C. and *F. K. Archer* for the liquidator. The letters of trust are void against the liquidator for non-registration under s. 93, sub-s. 1 (*c*), (*e*), of the Companies (Consolidation) Act, 1908.

Clause (*c*) refers to "a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale"; and clause (*e*) refers to "a mortgage or charge on any book debts of the company."

These letters of trust fall within both clauses. In the first place they are within clause (*c*). They are "declarations of trust without transfer" within s. 4 (the definition section) of the Bills of Sale Act, 1878, and are not within the exception "documents used in the ordinary course of business as proof of the possession or control of goods." In *In re Hamilton Young & Co.* (1) Vaughan Williams L.J. expressly said that the documents of lien "would be bills of sale but for the fact that they fall within the exception." In that case the fact was clearly proved. The evidence here is insufficient.

Secondly, so far as the letters of trust relate to the proceeds of the goods they are a charge on book debts within clause (*e*): *Ladenburg* v. *Goodwin, Ferreira & Co.* (2)

[ASTBURY J. There was no previous pledge in that case. The only charge was that created by the letter of hypothecation and the only things capable of being charged were the book debts.]

(1) [1905] 2 K. B. 772, 785. (2) [1912] 3 K. B. 275.

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In the present case the bank gave up its rights as pledgee in exchange for its rights as cestui que trust under the letters of trust. Assume that the trust or charge qua bills of lading alone would not be registrable. The trust or charge on the proceeds is pro tanto a charge on book debts and therefore the whole document in each case is registrable: see *National Provincial Bank* v. *Lindsell.* (1)

MacKinnon K.C. and *Dighton Pollock* for Barclays Bank. The letters of trust are not bills of sale at all. They do not create or evidence any charge as in *In re Hamilton Young & Co.* (2) The charge was created by the previous pledge, and even if it is in a sense evidenced by the letters of trust, there is sufficient evidence to bring them within the exception.

The letters of trust merely record the terms on which the pledgors were to realize the goods on behalf of the pledgees, and come within the principle of *Ex parte Hubbard.* (3) The pledgees do not lose their rights by this common and convenient mode of realization: *North Western Bank* v. *Poynter.* (4)

The same remarks apply to the supposed charge on book debts. No such charge is created. The only charge is that given by the pledge. In the *Ladenburg Case* (5) there was no previous pledge, and there was a clear charge on book debts. That case is quite irrelevant here.

Archer in reply. In *Ex parte Hubbard* (3) the pledge and the document regulating the pledgee's rights were contemporaneous. That is an important distinction: *Dublin City Distillery, Ld.* v. *Doherty.* (6) Here the pledge came first. Later on the bank released the pledge in exchange for the substituted security created by the letters of trust which in effect charged both the goods and their proceeds.

No doubt the bank might have preserved its original security by delivering the bills of lading to the company as agents for sale on the bank's behalf, as in *North Western*

(1) [1922] 1 K. B. 21.
(2) [1905] 2 K. B. 772, 785.
(3) 17 Q. B. D. 690, 697.
(4) [1895] A. C. 56.
(5) [1912] 3 K. B. 275.
(6) [1914] A. C. 823, 848, 850, 854–856, 863.

Bank v. *Poynter*. (1) But the letters of trust do not suggest any agency of that sort. They are really a substituted security for the released pledge.

The bank relies on *In re Hamilton Young & Co.* (2) and contends that the letters of trust were "documents used in the ordinary course of business, etc." But that is a fact which must be sufficiently proved in each case: *Dublin City Distillery, Ld.* v. *Doherty*. (3) The evidence here is insufficient. "The ordinary course of business" does not point to the "borrowing of money on mortgage or special agreement, though such a thing may be frequent among certain classes of persons": *Tennant* v. *Howatson*. (4)

Again if the letters of trust are substituted securities, then, even if they are not bills of sale, they create a charge on book debts. If, however, on construction, the Court holds that they are mere agency documents, I admit that the bank succeeds.

ASTBURY J. [after stating the facts.] The real question is whether these letters of trust are valid documents because, if so, the bank's right cannot be contested. The only ground upon which the liquidator is entitled to defeat the bank's claim is by showing that these documents given subsequent to the respective pledges are invalid under the Companies (Consolidation) Act, 1908, s. 93, sub-s. 1 (*c*), (*e*).

The liquidator puts his case on two grounds. He says in the first place that each letter of trust was "a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale" and therefore within clause (*c*); and, secondly, that it was a mortgage or charge on the book debts of the company within the meaning of clause (*e*).

With regard to the first point the liquidator contends, though I think without much confidence, that these letters of trust would, if executed by an individual, require

(1) [1895] A. C. 56.
(2) [1905] 2 K. B. 772, 785.
(3) [1914] A. C. 823, 856.
(4) (1888) 13 App. Cas. 489, 494.

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registration as bills of sale. He relies on the definition in the Bills of Sale Act, 1878, s. 4, and contends that the letters of trust are "declarations of trust without transfer" within that Act, and that they are not covered by the exception "documents used in the ordinary course of business as proof of the possession or control of goods."

In my judgment these letters of trust do not fall within the bills of sale definition at all. The pledge rights of the bank were complete on the deposit of the bills of lading and other documents of title. These letters of trust are mere records of trust authorities given by the bank and accepted by the company stating the terms on which the pledgors were authorized to realize the goods on the pledgees' behalf. The bank's pledge and its rights as pledgee do not arise under these documents at all, but under the original pledge: see *Ex parte Hubbard*. (1) The bank as pledgee had a right to realize the goods in question from time to time, and it was more convenient to them, as is common practice throughout the country, to allow the realization to be made by experts, in this case by the pledgors. They were clearly entitled to do this by handing over the bills of lading and other documents of title for realization on their behalf without in any way affecting their pledge rights: see *North Western Bank* v. *Poynter*. (2)

If I am right about this it is unnecessary to consider the exception in the Bills of Sale Act, 1878, s. 4, but if it were necessary to deal with it, it seems to me that *In re Hamilton Young & Co.* (3) is an authority for saying that these letters of trust are documents used in the ordinary course of business as proof of the possession or control of the goods in question.

The liquidator relies on *Dublin City Distillery, Ld.* v. *Doherty* (4), and particularly on two passages, in the judgments of Lord Parker and Lord Sumner. Lord Parker said (5): "It was suggested that the warrants in this case,

(1) 17 Q. B. D. 690, 697.
(2) [1895] A. C. 56.
(3) [1905] 2 K. B. 772, 785.
(4) [1914] A. C. 823.
(5) [1914] A. C. 856.

even if not warrants for delivery, were, nevertheless, within the exception as 'other documents used in the ordinary course of business as proof of the possession or control of goods . . . .' But in my opinion, in order to bring the warrants in question within these words it must be proved that they are documents used in the ordinary course of business, and this was certainly not proved." In the present case the letters of trust are wholly different from the warrants in *Dublin City Distillery, Ld.* v. *Doherty* (1), and on the evidence I think, if it were necessary to decide the question, that they are documents within the exception. Lord Sumner said, with regard to the warrants there being discussed (2) : "The company issued these warrants in great numbers, as the serial numbers show, but there is no evidence that it did so for any purpose except to create a security." In the present case the letters of trust were not issued for the purpose of creating a security at all ; the security existed, and they were mere records of authorities given to the pledgors to act as trustee agents for sale on behalf of the bank. In my opinion, therefore, the bills of sale point fails, and fails primarily for the reason that these documents are not within the definition of a bill of sale in any way at all.

The second point taken by the liquidator is a more difficult one. Sect. 93, sub-s. 1 (*e*), of the Companies (Consolidation) Act, 1908, provides that "a mortgage or charge on any book debts of the company" shall so far as any security on the company's property or undertaking is thereby conferred be void against the liquidator unless the prescribed particulars are registered. The object of that addition to the mortgage registration section in the Companies Act is perfectly plain and well known ; and the liquidator did not disguise the fact that if he succeeds he will succeed under the language of the section, quite irrespective of any intention of the Legislature to upset a long-established course of business in the City and elsewhere under which merchants are financed by financial and other people. The answer however to this point is, that these letters of trust really create no mortgage

(1) [1914] A. C. 823. (2) [1914] A.C. 863.

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or charge on book debts in any true sense of the word at all. The bank had its charge before these letters came into existence. The object of these letters of trust was not to give the bank a charge at all, but to enable the bank to realize the goods over which it had a charge in the way in which goods in similar cases have for years and years been realized in the City and elsewhere.

It is suggested that the letters of trust come within the judgment of Pickford J. in the *Ladenburg Case.* (1) In that case: "The defendant company, carrying on business as merchants in Manchester, consigned goods to their customers in South America, and, in order to obtain advances from the plaintiffs, who were bankers, wrote to the plaintiffs enclosing for their acceptance the company's drafts drawn in respect of specified shipments then being made and copies of the bills of lading and of the invoices relating thereto, and stating that the defendant company hypothecated the goods or the proceeds thereof to the plaintiffs. As between the defendant company and their customers the terms of sale were such that the property in the goods passed on shipment to the customers to whose orders the bills of lading were drawn. The plaintiffs having accepted drafts in the above circumstances, and the defendant company having gone into liquidation, the plaintiffs claimed to be entitled to the proceeds of the goods as against the liquidator:—Held, that the effect of the transaction was that the defendant company had created a charge on the company's book debts" within the meaning of s. 93, sub-s. 1 (*e*), and that the charge not having been registered was void.

Now in that case the bank had no pledge or other right in the goods at all before the transaction in question; the transaction was one which notwithstanding its form could not and did not give the bank any right except a charge over the company's book debts, and as Pickford J. pointed out, it was simply and solely a mortgage or charge on the company's book debts, and as such was avoided by the Act. There was, as I have stated, no previous right in the bank at all under

(1) [1912] 3 K. B. 275.

which they could claim as against the liquidator. The charge was explicit, and there was nothing at the date of the charge that the company could charge except its book debts, which it expressly and plainly charged to the bank as security. That case does not appear to me to have any bearing upon the present case at all. Here, if I may repeat myself again, the bank as pledgee created a trust agency in the company for the purpose of the realization of the bank's security. That trust agency was acknowledged and recorded in the letters of trust. That is the whole of the transaction. The letters of trust are neither bills of sale within s. 93, sub-s. 1 (*c*), nor are they in any sense mortgages or charges on book debts within clause (*e*) or any other clause of the section.

On these grounds there will be a declaration on the summons that the letters of trust are good and valid documents, and that the bank, as against the liquidator, is entitled in priority to the goods mentioned therein or their proceeds so far as they can be traced.

The bank's costs will be paid out of the assets and the liquidator's costs will be costs in the liquidation.

Solicitors: *Rawle, Johnstone & Co.; Durrant Cooper & Hambling.*

G. R. A.

SARGANT J.

1922

April 4.

In re UCAR'S PATENT.

[1922. U. 031.]

Patent—Revocation—Publication in earlier British Patent—Claim in earlier British Patent—Specific References—Earlier American Patent but subsequent British Patent—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 11, 26—*Patents and Designs Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 80), *ss.* 4, 21.

On an application under s. 26 of the Patents and Designs Act, 1907, for revocation of a patent granted before the passing of the Patents and Designs Act, 1919, it is not a ground for revocation that the patented invention is published in an earlier British specification, because under s. 26 the application can only be made on a ground "on which the grant of the patent might have been opposed," and prior publication was only made a ground of opposition by s. 4 of the Act of 1919.

An invention was patented in the United States on February 19, 1914, and under International Convention only a year was available for obtaining a patent of the invention in the United Kingdom. By virtue of art. 307 of the Treaty of Peace with Germany the time for patenting in the United Kingdom in such a case was extended to January 10, 1921, and the invention was in fact patented in this country in 1920. It was alleged that it contained a claim of an invention that had been patented in the United Kingdom in 1916 on an application made on February 15, 1915:—

Held, that it could not be relied on as a ground for revocation of this latter patent, as it was not in existence at the time of the grant of that patent, and that the insertion of a specific reference to it in the specification of the patent of 1916 could not be directed.

There is not the same reason for directing the insertion in the specification of a patent of a specific reference to an earlier specification containing a description of the patented invention as there is when the earlier specification contains an actual claim of some part of the patented invention; and in the former case the insertion of a specific reference ought not to be so frequently directed.

Letters Patent No. 2413 of 1915 was granted in March, 1916, to Florencio Comamala Ucar upon an application dated February 15, 1915.

On January 10, 1921, the British Metal Spray Company, Ld., applied under s. 26 of the Patents and Designs Act, 1907, for an order for the revocation of the above letters patent on the grounds (*a*) that the invention had been published in the complete specifications of prior British patents

No. 18840 of 1913, No. 18841 of 1913, and No. 19005 of 1913; (*b*) that the invention had been claimed in the complete specification of British patent No. 19954 of 1920; and (*c*) that the method of the invention was not sufficiently or fairly described in the complete specification. The time within which an application for revocation under s. 26 could be made had been extended by rules made under the Patents and Designs and Trade Marks (Temporary Rules) Act, 1914, so that the application to revoke was in time.

On February 24, 1922, the Assistant Comptroller declined to revoke the petitioner's patent, but directed the insertion of specific references by name and number to the four British specifications upon which the application was based.

The patentee petitioned by way of appeal from this decision and contended that the direction for the insertion of specific references to these four specifications ought not to be made upon the grounds (inter alia) (*a*) that the ground of application for revocation that there had been prior publication in three earlier British specifications was not open to the company in respect of a patent granted before the enactment of the Patents and Designs Act, 1919; (*b*) that the ground of application that there had been a prior claim by letters patent No. 19954 of 1920 was not open to the company, as the petitioner's patent No. 2413 of 1915 was granted before the application for letters patent No. 19954 of 1920 was made; and (*c*) that upon the merits the Assistant Comptroller should not have directed the specific references to be inserted.

The letters patent No. 19954 of 1920 were applied for in the United Kingdom on July 9, 1920. The invention had been patented in the United States of America under an application made on February 19, 1914, and by the International Convention in existence a British patent of the same invention could be applied for within one year. Owing to the war this was not possible and by art. 307 of the Treaty of Peace with Germany a minimum of one year after the coming into force of the treaty was accorded to the nationals of the High Contracting Parties "to accomplish any act, fulfil any formality . . . . and generally satisfy any obligation

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prescribed by the laws or regulations of the respective States relating to the obtaining, preserving, or opposing rights to, or in respect of, industrial property." It was by virtue of this article that the American invention had been patented in the United Kingdom in 1920.

The facts relevant to the question whether on the merits specific references to the four specifications ought to have been inserted are not set out, as the matter is reported solely on the questions of law and general principle involved.

Moritz for the patentee. At the time of the application for and grant of Ucar's patent the grounds of opposition to the grant of a patent were those set out in s. 11 of the Patents and Designs Act, 1907 (1), and by s. 26 of the Act an application to revoke can be made only on one or more of the grounds on which the grant of the patent might have been opposed. It is true that s. 4 of the Patents and Designs Act, 1919 (1), has added as a ground of opposition publication

(1) Patents and Designs Act, 1907, s. 11: "(1.) Any person may at any time within two months from the date of the advertisement of the acceptance of a complete specification give notice to the Patent Office of opposition to the grant of the patent on any of the following grounds:—

. . . . . .

"(*b*) that the invention has been claimed in any complete specification for a British patent which is . . . . of prior date to the patent the grant of which is opposed, ...

"(*c*) that the nature of the invention or the manner in which it is to be performed is not sufficiently or fairly described and ascertained in the complete specification, ... but on no other ground."

Sect. 26: "(1.) Any person who would have been entitled to oppose the grant of a patent, or is the successor in interest of a person who was so entitled, may, within two years from the date of the patent, in the prescribed manner apply to the Comptroller for an order revoking the patent on any one or more of the grounds on which the grant of the patent might have been opposed. . . . ."

Patents and Designs Act, 1919, s. 4: "For paragraph (*b*) of subsection (1) of section eleven of the principal Act, which relates to the opposition to grants of patents, the following paragraphs shall be substituted—'(*b*) that the invention has been published in any complete specification . . . . deposited pursuant to any application made in the United Kingdom within fifty years next before the date of the application for the patent the grant of which is being opposed . . . .; or (*bb*) that the invention has been claimed in any complete specification for a British patent which though not published at the date of the

in a complete British specification of earlier date; but this Act only came into force on December 23, 1919, and prior publication is not therefore a ground "on which the grant of the patent might have been opposed." The Assistant Comptroller regarded it as a ground open to the applicants in reliance on s. 21, sub-s. 1, of the Act of 1919. But in *In re Hale's Patent* (1) this Court decided, applying *Gardner* v. *Lucas* (2), that the Act was retrospective as to procedure only and not so as to affect existing rights. Publication in the three specifications of 1913 is not therefore a ground of revocation of this patent.

Again, the complete British specification No. 19954 of 1920 cannot be relied on as a ground of objection under s. 11, sub-s. 1 (*b*), and s. 26 of the Act of 1907, even assuming that it contained a claim for Ucar's invention, for it is subsequent in date to his patent. It makes no difference that it was patented in the United States of America upon an application made in February, 1914. It is not a prior British specification and can neither be used as a ground of revocation nor be directed to be referred to in Ucar's patent.

The Assistant Comptroller ought not to have directed specific reference in Ucar's specification to the three specifications of 1913. The insertion of specific references by way of disclaimer is discussed in *In re Stell's Patent.* (3) They are inserted in order to protect the public by ensuring that "a member of the public who desires to use the invention for which the applicant is seeking letters patent may not be misled into thinking that an invention is involved or included in the specification, which is in fact the subject of protection by prior letters patent of which no warning has been given": per Lord Buckmaster in *In re Wakfer and Peck's Application.* (4)

application for a patent the grant of which is opposed was deposited pursuant to an application for a patent which is or will be of prior date to such patent; or' . . . ."

Sect. 21: "(1.) This Act shall, except where otherwise expressly provided, apply to patents granted and applications for and specification relating to patents made and deposited, and designs registered, before as well as after the passing of this Act."

(1) [1920] 2 Ch. 377, 386.

(2) (1878) 3 App. Cas. 582, 603.

(3) (1891) 8 R. P. C. 235, 236.

(4) (1915) 32 R. P. C. 199, 201.

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This reason applies only when an invention involved or included in the specification has been claimed in an earlier specification. No necessity for the insertion of a specific reference arises when prior publication only is in question. Prior publication is material only as regards validity. Lastly, there is on the merits no ground for directing the insertion of specific references.

K. R. Swan for the company. That the mere description of an invention in an earlier specification is a ground for inserting a specific reference is shown by s. 7 of the Act of 1907. When the invention is claimed in an earlier specification, it is a ground for refusing to grant the patent under s. 7, sub-s. 4.

The company are entitled to rely on publication as a ground of revocation, for when the petition for revocation was heard the Act of 1919 had been passed. It is a mere matter of procedure that is involved and therefore under s. 21, sub-s. 1, of the Act of 1919 they can properly rely on prior publication : compare *In re Pierpoint's Patent.* (1)

The words " might have been opposed " in s. 26, sub-s. 1, of the Act of 1907 are mere terms of reference and equivalent to " might be opposed " : compare s. 26, sub-s. 2.

The patent No. 19954 of 1920 was admittedly granted after Ucar's patent, but the invention was patented in the United States upon an application in February, 1914, and would but for the war necessarily have been patented in this country within a year. This time was extended by art. 307 of the Treaty of Peace with Germany by allowing a year from the date of the Treaty for doing any act or fulfilling any formality prescribed by the laws or regulations of the respective States relating to the obtaining, preserving, or opposing rights to, or in respect of, industrial property. The result is that the application to patent the American patent in the United Kingdom must for the present purpose be treated as made by February, 1915. There would then have been a right to oppose in respect of it.

Lastly the insertion of the specific references to the earlier

(1) (1921) 38 R. P. C. 353.

patent is required to prevent deception as to the state of knowledge before Ucar's patent: see *In re Wakfer and Peck's Application.* (1)

Moritz in reply. There can be no question of inserting a specific reference to the patent of 1920, as it did not exist when Ucar's patent was granted. Specific references to the three patents of 1913 ought not to be inserted (1.) because there is in them at most a description of, and not a claim to, the invention, and (2.) because there is no ground for it on the merits.

SARGANT J. This is a petition by way of appeal from the decision of the Assistant Comptroller on an application under s. 26 of the Patents and Designs Act, 1907, which is continued with modifications by the Patents and Designs Act, 1919, to revoke Ucar's patent No. 2413 of 1915. The grounds of the application were first that the invention described has been published in complete specifications of British patents No. 18840 of 1913, No. 18841 of 1913, and No. 19005 of 1913; secondly that the invention has been claimed in the complete specification for a British patent No. 19954 of 1920; and thirdly that the nature of the invention is not sufficiently or fairly described and ascertained in the complete specification. That was the application that was dealt with by the Assistant Comptroller. The Assistant Comptroller after having heard the applicants and the patentee declined to revoke the patent, but instead directed the insertion of a specific reference by name and number to the four British specifications No. 18840 of 1913, No. 18841 of 1913, No. 19005 of 1913 and No. 19954 of 1920.

This appeal is based upon several grounds. The first is a ground of some public interest which may apply to a considerable number of applications. It is that publication in a prior British specification was not open as a ground of opposition to the original grant of the patent, and therefore cannot be relied upon on an application for the revocation of that patent.

(1) 32 R. P. C. 199, 202.

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Under the Act of 1907, s. 11, various grounds are given on which a person may oppose the grant of a patent and one of those grounds is: "That the invention has been claimed in any complete specification for a British patent which is . . . . of prior date to the patent the grant of which is opposed." Then s. 26, sub-s. 1, of the same Act, provides: [His Lordship read the sub-section.] Then under s. 4 of the Act of 1919 an alteration is made as to the grounds on which the grant of a patent may be opposed, and it is provided that an additional ground of opposition may be that the invention has been published in a complete specification of earlier date.

The patent was applied for on February 15, 1915, and was granted in March, 1916. The Act of 1919 did not come into operation until December 23, 1919. By virtue of war-time legislation the period of two years from the date of the grant of a patent within which, under the Act of 1907, an application had to be made for its revocation, has been extended, and in this case the application to revoke is made within the prescribed time as extended. The applicants for revocation contend that, as the time for lodging the petition to revoke has been extended past the date when the Act of 1919 came into force, there is a corresponding extension of the grounds on which the application to revoke may be made. I am entirely unable to follow that reasoning. It seems to me that, although the time for lodging the application for revocation has been extended, so that the application, though it would have been out of date under the Act of 1907, is in time by virtue of war legislation, nothing has been done to alter the provision of s. 26 of the Act of 1907 that the application to revoke may be made only upon "the grounds on which the grant of the patent might have been opposed." During the period from the application for to the granting of the patent —that is from February, 1915, to March, 1916, there could admittedly have been no opposition to the grant of the patent on the particular ground that the invention had been published, though not claimed, in a prior British specification. I can see nothing whatever in the later legislation to render

the patent liable to revocation on grounds more extensive than those on which it was liable to be opposed, and in my judgment therefore that ground of revocation is a ground of which the applicants were not able to avail themselves.

Then I come to the ground of revocation based on British patent No. 19954 of 1920. The position with regard to that patent is rather curious. It was applied for in the United States of America on February 19, 1914, and under the International Convention in force it was competent for the patentee to apply to have a similar patent granted in England down to February 19, 1915. By virtue of war legislation that period of one year was extended and ultimately the corresponding patent was applied for in England on July 9, 1920.

This was rendered possible by the application of art. 307 of the Peace Treaty which provides: "A minimum of one year after the coming into force of the present Treaty shall be accorded to the nationals of the High Contracting Parties, without extension fees or other penalty, in order to enable such persons to accomplish any act, fulfil any formality, pay any fees, and generally satisfy any obligation prescribed by the laws or regulations of the respective States relating to the obtaining, preserving, or opposing rights to, or in respect of, industrial property"—which of course includes patents—"which, except for the war, might have been acquired . . . . as a result of an application made before the war or during its continuance." The argument on behalf of those asking for revocation of the patent on the ground that the invention was claimed in British patent No. 19954 of 1920 is that as the only reason why the patent was not applied for in England within a year of the application in America was that the war was going on, the matter ought to be treated in all respects as if the American patentee had done that which he probably would have done if the war had not taken place—namely, made an application for the grant of a patent in England within the time allowed. In that case, it is said, this patent would have afforded a ground, under the Act of 1907, for opposing the grant of the patent it is now sought

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to have revoked, and must accordingly afford a ground also for its revocation. It seems to me that this contention seeks to give too wide an effect to art. 307. It is quite true that the time has been extended for patenting the American invention in this country, but to hold that the effect is the same as if the patent had been applied for in England at a date long before it was actually applied for, and to modify the rights of the grantee of the patent it is sought to revoke by supposing that something was done, which never was done at all, seems to me to be to treat the matter on altogether too hypothetical a footing. The article enables certain rights to be preserved and it does so by extending the time for doing acts prescribed for "obtaining, preserving, or opposing rights to, or in respect of, industrial property." But I am unable to construe it as putting persons to whom it applies in precisely the same position as they would have been in, if the war had not taken place. Looking at the language of the article, I find it impossible to hold that the matter must be regarded as if a patent of this American invention had been granted in 1915 instead of 1920 or to say that the British patent of this American invention afforded a ground on which the grant of Ucar's patent could have been opposed between February 15, 1915, and March, 1916. Although the time for applying to revoke the patent has been extended, it is in my judgment impossible to say that there has been such an extension of the grounds on which that revocation could be obtained as to enable reliance to be placed on the specification of a patent that could not, as the facts were, have been used for opposing the original grant of the patent.

That being so, the further question arises whether in the circumstances of this particular case there ought to be a specific reference to the four patents in question. The Assistant Comptroller has ordered the insertion of a specific reference to each of those four patents. As regards the last one in respect of which application was only made in England in July, 1920, I am convinced by Mr. Moritz's argument that it would be wrong to direct the insertion of a

specific reference to it, seeing that no such reference could have been inserted at the time when the patentee's application for a patent was granted. It could not have been made a condition of the grant of the patent that there should be a specific reference to a British specification that was not in existence until three or four years afterwards, and that being so it appears to me impossible to say now that, as a condition of refusing the application to revoke, a specific reference to that patent should be inserted.

I feel a difficulty with regard to the other three patents. The matter is very difficult and technical, and I hesitate to differ from the view of the Assistant Comptroller. I do not think it by any means follows that the rule that there ought to be a specific reference to any earlier patent the existence of which may imperil or prevent the user of the patent in question, involves that there should always be a specific reference to any prior patent which under the recent legislation could be used for opposing the grant of the patent on the ground of prior publication. It does not follow that there ought to be a specific reference not only to earlier specifications which prevent the user of the patent in question but also to specifications which at most imperil the monopoly rights of the owner of the patent in question by casting doubt upon the sufficiency, novelty or subject matter of his invention. It seems to me that warning the public that the patent before them is a patent which may not be available to be used at all, except with the consent of some other person, is a very different thing from warning them that there is a possibility that the patent does not confer monopoly rights. Every one dealing with the subject matter of a patent must always know that the monopoly rights of the patentee are somewhat doubtful; and a person attempting to take an assignment of the monopoly rights is in a very different position from a person who is merely attempting to use the invention. It is more necessary to give warning that it is not safe to use an invention than to give warning that the monopoly rights are liable to be defeated by reason of some particular defect. I do not think, therefore, that specific

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references ought in general to be so frequently directed where there is merely danger to the monopoly as where there is danger with regard to the user of the patent.

[His Lordship then proceeded to deal with the question, apart from these general considerations, whether specific references to the three specifications ought to be inserted and came to the conclusion that it was not necessary—and unless really necessary certainly not desirable—that there should be inserted in the letters patent any specific reference at all.]

In my judgment therefore this appeal from the decision of the Assistant Comptroller ought to be allowed.

Solicitors: *Kinch & Richardson; E. W. L. U. Peters.*

H. C. G.

SARGANT J. 1922 *March* 28, 29; *April* 27.

COCHRANE *v.* COCHRANE.

[1921. C. 1900.]

Power of Appointment—Special Power—Exercise to obtain Personal Advantage—Freedom to Remarry—Fraud on Power.

A wife obtained against her husband, who was the donee of a special power to appoint a fund of 50,000*l.* amongst his children or remoter issue, a decree nisi for the dissolution of their marriage. Negotiations ensued for the compromise of the wife's claim to permanent alimony, and ultimately terms of settlement were signed by which (inter alia) the husband agreed to appoint more than half the 50,000*l.* fund to the only child of the marriage. It was in evidence that the husband was at the time desperately anxious to have the decree nisi made absolute at the earliest possible moment so that he might be free to remarry, that the wife's legal adviser was aware of this, and that it formed an important element in the negotiations, during which the husband was pressed to make a far larger appointment than he had originally proposed. The terms of settlement were confirmed by the Divorce Court and the decree nisi made absolute. Afterwards the husband only executed the appointment on advice that the Divorce Court would, if necessary, order him to do so, and that, if he then still refused to make the appointment, he might be committed for contempt of Court:—

Held, that in the absence of evidence that the wife had accepted a smaller annuity by way of alimony in consideration of the increased

appointment to her child, the appointment was not rendered invalid by reason of its execution in pursuance of an agreement entered into as part of the negotiations as to alimony, but that the appointment was a fraud on the power as having been made by the donee in pursuance of an agreement entered into by him to obtain a personal benefit for himself—namely, freedom to remarry.

Semble, that even if the appointment had not been made in pursuance of an illegitimate agreement, it would have been invalidated by the circumstances in which the deed of appointment came to be executed.

WITNESS ACTION.

The facts appear from the introductory part of the judgment of Sargant J., which was as follows:—

By his will dated August, 1904, the late Sir Henry Cochrane, baronet, deceased, appointed the defendants David Francis Moore and James Robertson Coade executors and trustees thereof, and after making certain specific and pecuniary bequests and specifically devising certain real estate, devised and bequeathed the remainder of his real and personal estate unto and to the use of his said trustees, their heirs, executors and administrators respectively according to the nature and tenure thereof upon trust to sell, call in and convert into money such parts thereof as should not consist of ready money, and out of the moneys to arise from such sale, calling-in and conversion and the ready money of which he should be possessed at the time of his death to pay his funeral and testamentary expenses and debts; and he desired his said trustees out of such moneys to hold a sum of 50,000*l.* in trust for his son the defendant Sir Ernest Cecil Cochrane during his life and after his death (subject to such jointure as he might have created in favour of his wife in exercise of the power thereinafter reserved to him) in trust for all or such one or more exclusively of the others or other of the children or remoter issue of Sir Ernest, at such age or time or respective ages or times, if more than one in such shares, and with such future or other trusts for their respective benefit and such provision for their respective advancement either in the lifetime of Sir Ernest or after his death and maintenance and education at the discretion of his said trustees or any other person or persons, and in

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such manner in all respects as Sir Ernest should from time to time by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment as aforesaid in trust for all or any the children or child of Sir Ernest who being sons or a son attained the age of twenty-one years, or being a daughter or daughters attained that age or married, and if more than one in equal shares. And the testator thereby empowered Sir Ernest to appoint by deed or will to his then wife (namely, Dame Ethel Amy Cochrane, the next friend of the infant plaintiff in this action) in the event of her surviving him or to any future wife for her life, or any lesser period, a rentcharge or rentcharges by way of jointure not exceeding in all the annual sum of 800*l.* to be charged on or payable out of the income of the said sum of 50,000*l.*, or the investments representing the same. This trust fund is hereinafter referred to as the 50,000*l.* trust fund.

The will contained a similar settlement of a sum of 100,000*l.* in favour of a younger son of the testator, Stanley Herbert Cochrane, and his children and issue with a similar power of jointuring and provided that in case no child of the said Stanley Herbert Cochrane should attain the age of twenty-one years, or being a daughter, should marry earlier, the said sum of 100,000*l.* and the investments representing the same should be held (subject to any jointure appointed by him) upon the like trusts in favour of the defendant Sir Ernest Cecil Cochrane and his issue as were thereinbefore contained concerning the 100,000*l.* trust fund for Stanley Herbert Cochrane and his issue.

The will also contained a settlement, to which it is not necessary to refer in detail, of a separate sum of 50,000*l.* as a fund for the endowment of the persons for the time being entitled to the testator's baronetcy in succession to him.

The testator, Sir Henry Cochrane, died on September 11, 1904, and his will was proved in the Principal Probate Registry in Ireland on November 1, 1904. On the death of the testator the defendant, Sir Ernest Cecil Cochrane, succeeded to the baronetcy. Sir Ernest had intermarried

on June 8, 1898, with the said Dame Ethel Amy Cochrane. There was issue of the said marriage one child only—namely, the plaintiff Beatrice Dorothea Cochrane who was born on December 2, 1900.

On November 24, 1910, Lady Cochrane obtained a decree nisi in the Probate, Divorce and Admiralty Division of the High Court of Justice dissolving her marriage with Sir Ernest. The custody of the infant plaintiff was committed to Lady Cochrane.

After the making of the decree nisi a negotiation took place between Lady Cochrane through Mr. Walter Lumley of the firm of Lumley & Lumley, and Sir Ernest through Mr. George Jefford Fowler of the firm of Fowler & Co. for settling the permanent alimony or maintenance to be allowed to Lady Cochrane, and also for making provision for the infant plaintiff. I have spoken of the plaintiff as the infant plaintiff, but I see she must have attained twenty-one after the issue of the writ. The first definite proposals on the subject are contained in a statement on behalf of Sir Ernest which was forwarded to Messrs. Lumley & Lumley on April 4, 1911. In that statement the net income of Sir Ernest is estimated at some 7600*l.* per annum, subject however to certain possible heavy liabilities, and a proposal is made that Lady Cochrane should receive by way of permanent alimony a sum of 2500*l.* per annum, being approximately one third of his income. The statement then proceeds as follows. "Under the trust of the will of the late Sir Henry Cochrane Sir Ernest Cochrane has, subject to his life interest, a power of appointment among his children over the sum of 50,000*l.* and in certain events—namely, the decease of his brother Stanley without issue, an appointment over a further 100,000*l.*, making 150,000*l.* in all. Sir Ernest Cochrane proposes to release these powers of appointment so that the 50,000*l.* or 100,000*l.* as the case may be shall go among all his children including the child of his marriage with Lady Cochrane in equal shares."

There is no definite reliable evidence of what, if anything, took place between the parties between the sending of this

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statement and the beginning of May, 1911. But on May 2, 1911, an important interview took place between Mr. Fowler (on behalf of Sir Ernest) and Lady Cochrane and Mr. Walter Lumley, and as a result of that interview and of a subsequent conference between Mr. George Fowler and Sir Ernest, a letter of May 4, 1911, was written by Messrs Fowler & Co. to Messrs. Lumley and Lumley in the following terms: "Dear Sirs, Cochrane *v.* Cochrane. Without prejudice. We have had an opportunity of conferring with Sir Ernest Cochrane on the interview we had with Lady Cochrane and yourselves the day before yesterday, and we are instructed to submit to you final proposals, which are as follows:—viz.: 1. Lady Cochrane to have 3000*l.* a year for life. 2. If Lady Cochrane dies in the lifetime of Sir Ernest Cochrane, leaving her daughter her surviving, the daughter is to have an income of 1000*l.* a year, to be increased, on marriage to 1500*l.* a year. 3. 25,000*l.* is to be immediately appointed to the daughter and the remaining 25,000*l.* as also Sir Ernest's contingent interest in the 100,000*l.* and one half of the Baronetcy fund of 50,000*l.* is to go among all Sir Ernest's children (including the daughter) in equal shares. 4. Lady Cochrane is to maintain and educate her child until marriage, but on her marrying, the daughter is to have 500*l.* for trousseau, and an income of 500*l.* a year: and Sir Ernest suggests that Lady Cochrane should in that event, give up 500*l.* a year to the daughter, so that she may have an income of 1000*l.* a year after marriage, but this will be for Lady Cochrane to determine. 5. Your costs against Lady Cochrane, as between solicitor and client, to be taxed or agreed and paid by Sir Ernest Cochrane. 6. The wedding present to which Lady Cochrane referred to be handed to her now on behalf of the child, and Lady Cochrane is also to have the silver photo frames and any other articles which belong to her. We are instructed to add that Sir Ernest Cochrane considers these proposals are liberal, and that unless, within a week, they are in substance accepted, the matter must take the regular course. If there are any small points which are not otherwise referred to in this letter, they can no doubt be adjusted."

The proposals in this letter are markedly more favourable to Lady Cochrane and the plaintiff than those contained in the statement of April 4. There is an increase under head 1 of Lady Cochrane's maintenance from 2500*l.* to 3000*l.* per annum; there are under heads 2 and 4 new arrangements for the provision of intermediate income for the plaintiff in various events; and further there is a very striking increase in the share of the 50,000*l.* trust fund which is certainly to come to the plaintiff under the appointment which is to be made to her by Sir Ernest, as compared with what she would receive under a release of Sir Ernest's power as proposed in the statement. For while under a release the plaintiff would, as between herself and any future children of Sir Ernest, receive a share in the 50,000*l.* fund equal only to that of any future child, she would under the proposed appointment receive a share three times as great as that of one further child only, four times as great as that of each of two further children, and five times as great as that of each of three further children. This proportionate disparity would be considerably diminished if the further 100,000*l.* should ultimately become distributable between Sir Ernest's children; but inasmuch as the interests of Sir Ernest's children in that fund are contingent only, it is obvious that much less importance must be attached to her expectations with regard to that fund. It is clear therefore that, though the terms contained in the letter of May 4 were expressed to be "proposals" on the part of Sir Ernest, they were not of the nature of proposals originally emanating from him. There had obviously been a discussion between the parties as to the nature and amount of the provision to be made by Sir Ernest for his wife and daughter. And the proposals represent the extent to which as a result of that discussion, and after ascertaining the views of Lady Cochrane and her adviser, Mr. Walter Lumley, Sir Ernest was at that time ready to go in the way of making the provision for which they were asking.

On May 8 there was a further conversation or discussion between Mr. Fowler and Mr. Walter Lumley, and a further conference between Mr. Fowler and Sir Ernest, and as a

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result a letter was sent by Messrs. Fowler & Co. to Messrs. Lumley & Lumley in the following terms: "Dear Sirs, Cochrane *v.* Cochrane. Without prejudice. We have seen Sir Ernest this afternoon with reference to our conversation with you to-day, and, taking into account his liabilities, it seems to us that the offer of 3,000*l.* a year amounts, or practically amounts, to a moiety of our client's income. We are instructed, however, to say that provided, and provided only, that the decree is made absolute on the 29th inst. our client will, in addition to the 3,000*l.* a year, contribute 250*l.* towards the maintenance and education of his daughter. The other points in the proposal must of course stand."

After this there was some further correspondence as to an increase (which was eventually agreed to) in the income to be provided for the plaintiff in the event of Lady Cochrane predeceasing Sir Ernest. And there was also a controversy as to the amount of security to be provided by Sir Ernest for the payment of the annuities to Lady Cochrane and the plaintiff—a controversy which nearly resulted in complete failure of the negotiations. At an interview on May 30, 1911, the security provisionally agreed on, subject to confirmation by Lady Cochrane, was the income of Sir Ernest from the 50,000*l.* trust fund and also the income from three-fourths of the Preference Shares and Ordinary Shares belonging to Sir Ernest in a company called Cantrell & Cochrane, Ld.; and subject to this confirmation the whole of the terms (which had by this time been reduced to writing) were agreed. But on the morning of May 31, at an interview at Messrs. Fowlers' office, at which Mr. George Fowler, Sir Ernest and a clerk of Messrs. Lumley & Lumley were present, it was insisted on behalf of Lady Cochrane that the security should be increased to seven-eighths instead of three-quarters of these shares. This further increase Sir Ernest declined to accept, with the result that the interview terminated abruptly and the whole negotiation was broken off. In the course of the morning however Sir Ernest reconsidered the position, and ultimately went with a friend to Messrs. Lumley & Lumley's office, saw Mr. Walter Lumley, and accepted and signed the terms

as they had been insisted on that morning. He also signed two letters addressed to Messrs. Lumley & Lumley which were placed before him by Mr. Walter Lumley and are both dated May 31, 1911. The first of these is a letter verifying his holding of shares in Cantrell & Cochrane, Ld., and undertaking not to deal with them in derogation of the terms of settlement signed by him that day. The second is in these terms—namely: "The information contained in my letter to you dated to-day is given you as the basis on which you are making application for the decree to be made absolute on behalf of your client."

In explanation of Sir Ernest's attitude it should here be stated that throughout the negotiations he was extremely anxious that Lady Cochrane should proceed as quickly as possible to have the decree nisi made absolute, inasmuch as he desired to contract a second marriage with the lady who is now his wife, and who it should in fairness be stated was in no way whatever concerned with the circumstances leading to the decree nisi. How far this anxiety and the reason for it were known to Lady Cochrane or Mr. Walter Lumley and were used as a lever in the negotiations, and how far the conduct of Sir Ernest with regard to the appointment to his daughter was influenced by this anxiety are questions which will be dealt with in a later part of this judgment.

By the terms of settlement then signed by Sir Ernest it was provided (clause 1) that Sir Ernest should transfer to certain trustees seven-eighths (and not three-fourths only) of the whole of his shares in Cantrell & Cochrane, Ld., and should execute a deed declaring that they should hold his life interest in the 50,000*l.* trust fund and the said shares upon trust out of the income of the 50,000*l.* trust fund and the dividends of the shares to pay Lady Cochrane an annual sum of 3250*l.* (Clause 2) That after the death of the survivor of Sir Ernest and Lady Cochrane the trustees should pay out of the dividends of the shares to such person as Lady Cochrane should by deed expressly referring to that power appoint an annuity not exceeding 500*l.* a year during the life of such person and (clause 3) that Sir Ernest should by deed irrevocably

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appoint subject to his life interest the sum of 25,000*l.* (part of the 50,000*l.* trust fund) to the plaintiff for her life and after her death to her children who should attain the age of twenty-one years in equal shares, and if there should be only one such child the whole to such child, and if there should be no child to such person as she should appoint but so as not to transgress the rule against perpetuities, and also a share (to be settled in like manner as the above-mentioned sum of 25,000*l.*) pari passu with any other child or children of any future marriage of Sir Ernest Cochrane in the remaining part of the said sum of 50,000*l.* The said terms of settlement further provided that the deed to be executed by Sir Ernest as aforesaid should also contain a declaration that, in the event of the death of Lady Cochrane leaving the plaintiff her surviving, the trustees should as from the date of the death of Lady Cochrane pay out of the income of the 50,000*l.* trust fund and the dividends of the said shares an annuity of 2000*l.* to the plaintiff during her life by equal quarterly payments, the first quarterly payment to be made at the end of three calendar months from the date of the death of Lady Cochrane, provided that on the death of Sir Ernest Cochrane such annuity should abate by the amount of the interest on the said sum of 25,000*l.* And there were other provisions in the terms of settlement to which it is not necessary here to refer.

Two days after the signing of these terms of settlement—namely, on June 2, 1911, the decree nisi was made absolute on the application of Lady Cochrane. And in the month of September of that year Sir Ernest solemnised the marriage with his present wife for which he was so anxious.

After the signature of the terms of settlement some delay and difficulty occurred in carrying them into execution. In the first place a question arose as to whether the power to Lady Cochrane to appoint the annuity of 500*l.* per annum was to operate as from Lady Cochrane's death or only as from the death of the survivor of herself and Sir Ernest. As to this Sir Ernest agreed that the terms as drawn up did not accurately represent the bargain, and was willing that the power should operate as from Lady Cochrane's death whether he survived

her or not. But a more serious difficulty was as to the proportion of Sir Ernest's shares in Cantrell & Cochrane, Ld., which was to be transferred as security. Sir Ernest objected to transfer more than three-fourths of his shares, and insisted that the change to seven-eighths had been made in such circumstances as not to be enforceable. On the other hand, Lady Cochrane relied on the signed terms and ultimately made application to the Divorce Court for an order that the terms should be confirmed and carried out. On this application a number of affidavits were filed to one passage in which I shall have occasion to refer; but ultimately, on December 4, 1911, terms were arrived at between the parties which are indicated by the following endorsement on counsel's brief—namely, "Vary terms of settlement dated May 31, 1911. (1.) By making shares to be assigned to trustees 14,236 Preference Shares and 25,000 Ordinary Shares in Cantrell & Cochrane, Ltd. (2.) By making the power of appointment of 500*l.* annuity run from death of petitioner whether respondent be then living or not; (3.) By making the costs payable by the respondent the full solicitor and client costs properly incurred by the petitioner as petitioner and similar costs of journey to Nice. Confirm the said terms of settlement so varied. Refer to Mr. Hume to prepare necessary documents to give effect to terms of settlement as hereby varied. Adjourn motion generally. Take all affidavits off file." And on the same day an order in accordance with these terms was made by Bargrave Deane J. The preparation of the necessary documents was then proceeded with by the late Mr. Hume and they were ready to be executed about the beginning of April, 1912. But Sir Ernest apparently still hesitated about executing them, and in this state of things a consultation was arranged by Mr. Fowler for Sir Ernest with counsel—namely, Mr. Grazebrook and Mr. Crossman; and the advice then given by counsel, which was verbal, was communicated to Sir Ernest. There is in existence a memorandum made by one of Mr. Fowler's clerks of the advice so given, and this has been accepted by the parties as accurate, and is to the following effect: "Mr. Grazebrook

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advised that, if Sir Ernest refused to execute the deeds, it would be open to the other side to apply for an order directing him to execute them within a specified time; and, upon his failing to do so, they would be at liberty to apply to the Divorce Court to attach him, or the Court could order the registrar to execute the deeds on behalf of Sir Ernest. It was explained by Mr. Crossman that he had great difficulty in advising Sir Ernest to execute the deeds having regard to the fact that, if Sir Ernest had further children, the execution of the appointment in favour of the child of his first marriage would be a fraud on the power."

Shortly after this consultation Messrs. Lumley & Lumley wrote to Messrs. Fowler & Co. asking for an appointment to complete, and to this Messrs. Fowler replied in a letter of March 8 which, omitting an unimportant passage, is in the following terms: "We have considered the form of the deeds as settled by Mr. Hume, and we have submitted them to our conveyancing counsel Mr. Stafford Crossman, who feels the greatest difficulty in advising Sir Ernest to execute the deeds by reason of the fact that, if Sir Ernest has further children, the execution of the deed of appointment in favour of the child of his first marriage would (contrary to the desire and intention of both our clients) be a fraud on the power of appointment, so that the children by our client's present or any subsequent marriage would have a right to set aside the appointment as being a fraud on the power. Having regard, however, to the order of the Divorce Court our client will, though most reluctantly, execute the deeds in their present form, if your client insists upon it, but we should like to have your written assurance that the contents of the letter have been brought under the notice of your client so that it may not be open to her hereafter to say that she was not aware of the opinion expressed by our conveyancing counsel. We suggest that you should consider the decision in *In re Bradshaw*. (1)" To this letter Messrs. Lumley & Lumley sent an answer on the following day in which they stated that they had sent a

(1) [1902] 1 Ch. 436.

copy of Messrs. Fowler & Co.'s letter to Lady Cochrane, and referred them to an opinion of Mr. Edward Hume, a copy of which Messrs. Fowler & Co. already had, and which was in favour of the validity of the proposed appointment. The matter then proceeded in the usual course, and on April 11, 1912, was completed by the execution of deeds to give effect to the terms of settlement of May 31, 1911, as modified by the compromise arrived at on December 4, 1911.

Of these deeds it is only necessary to mention one—namely, that to effect the proposed appointment to the plaintiff. This was an indenture dated April 11, 1912, and made between Sir Ernest of the one part and the defendants David Francis Moore and James Robertson Coade as trustees of the other part, whereby Sir Ernest irrevocably appointed and declared that the defendants David Francis Moore and James Robertson Coade and the survivor of them or other the trustees or trustee for the time being of the said will should from and after the death of Sir Ernest, subject to any exercise of the power to appoint a jointure which was given him by the said will and which power was thereby expressly reserved and subject to the power of varying investments contained in the said will, stand possessed of one equal moiety of the 50,000*l.* trust fund, and also of a share pari passu with any child or children of Sir Ernest Cochrane thereafter to be born in the other moiety of the 50,000*l.* trust fund upon trust for the plaintiff during her life for her separate use without power of anticipation, and from and after her death upon trust as to the capital and income of the premises thereby appointed for all or any the children or child of the plaintiff who being male should attain the age of twenty-one years, or being female should attain that age or marry and if more than one in equal shares. And if there should be no such child of the plaintiff then subject to the trusts thereinbefore declared upon trust for such person or persons as the plaintiff should by will or codicil appoint but not so as to transgress the rule against perpetuities.

There have been issue of the second marriage of Sir Ernest,

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three children—namely, an eldest son, the defendant, Ernest Henry Cochrane, and two younger children, the defendants, Elizabeth Margaret Cochrane, and Desmond Oriel Alistair George Weston Cochrane, of whom the eldest son was born in the month of February, 1913. In November of that year Mr. W. H. Schumacher, the paternal grandfather of the defendant, Ernest Henry Cochrane, purporting to act as his next friend, raised a question as to the validity of the appointment of April 11, 1912. But Mr. W. H. Schumacher died not long afterwards and the matter was not then proceeded with and was allowed to drop. In the month of October, 1920, however, by a deed poll, dated the fourth day of that month and under his hand and seal, Sir Ernest purported to declare that the appointment affected to be made by the indenture of April 11, 1912, was wholly void as having been made by him against his real wishes and pursuant to an agreement which he made unwillingly with Lady Cochrane with the sole object of inducing her to make absolute the decree nisi obtained by her against him in the Divorce Court; and Sir Ernest also thereby purported to direct and appoint that, subject and without prejudice to his life interest under the aforesaid will and to every appointment theretofore or thereafter made by him in favour of any past, present or future wife of his under the power in that behalf conferred on him by the said will, the trustees or trustee from time to time of the said will should hold the 50,000*l.* trust fund and the income thereof in trust for all his children whether then living or thereafter born as tenants in common in equal shares, with certain provisions for accruer as regards the shares of any child dying under the age of twenty-one years without leaving issue living at the death of the survivor of himself and such child. And the said deed poll also provided that the appointment thereby made should be revocable as therein mentioned. It was impossible in the interests of the plaintiff to allow this deed poll to remain unchallenged, and within a few months of its execution this action was brought.

The claim in the action was to have it declared that the

deed of appointment of April 11, 1912, operated as a valid and effectual irrevocable appointment, and that the deed poll of October 4, 1920, was invalid and inoperative so far as it purported to declare void or defeat, supersede, vary or prejudice the earlier deed.

Maugham K.C. and *C. W. Turner* for the plaintiff. The deed of appointment of April 11, 1912, was a valid exercise of the power of appointment. To be a fraud upon the power it must be exercised "for purposes foreign to those for which it was created": *Topham* v. *Duke of Portland.* (1) It is necessary however to distinguish between motive and purpose. The motive here may have been to obtain freedom to remarry, but the purpose was to make provision for the future of the only child of the first marriage and there is nothing in that alien to the power. Mere unreasoning hate of an object of a power does not invalidate an exclusive appointment to this object of the power: see per Lord Redesdale in *Vane* v. *Lord Dungannon.* (2) If the persons to whom the appointment is made are objects of the power and there is nothing to fetter them in dealing with the fund appointed to them, the appointment is valid however capricious may be the motive of the particular exercise of the power: *Topham* v. *Duke of Portland* (3); *Duke of Portland* v. *Topham.* (4)

Although in a sense Sir Ernest Cochrane was obtaining a benefit by the exercise of the power, it was not of the nature contemplated as constituting a fraud on a power in Lord Parker's definition of a fraud on a power in *Vatcher* v. *Paull.* (5) Nor is it any ground for holding that the exercise of the power was invalid, because it was agreed to at the same time that negotiations as to permanent alimony were being conducted.

Stafford Crossman for Sir Ernest Cochrane.

Romer K.C. and *Farwell* for the children of the second marriage. The question is whether Sir Ernest Cochrane

(1) (1863) 1 D. J. & S. 517, 570.
(2) (1804) 2 Sch. & Lef. 118, 130.
(3) (1869) L. R. 5 Ch. 40, 57.
(4) (1864) 11 H. L. C. 32, 54.
(5) [1915] A. C. 372, 378.

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exercised the power in 1912 so as to be a fraud on the donor of the power. When the donee exercises a special power for the purpose of obtaining a benefit for himself, that is a fraud on the power. To agree to exercise such a power in a particular manner as a term in negotiating between the donee and some third party suffices to invalidate an exercise of the power pursuant to such agreement. Here Sir Ernest Cochrane agreed to make the appointment of 1912 as one of the terms of an agreement between him and his wife as to permanent alimony. That alone suffices to render the appointment invalid. Further he agreed to make the disproportionate appointment out of his anxiety that his wife should have the decree nisi for divorce made absolute and leave him free to remarry. This was known to the wife's adviser. The agreement to make this appointment was made therefore under pressure and to obtain a personal benefit; and on this ground also it is invalid. Further the actual exercise of the power was compelled by the advice he received that if he failed to execute the deed of appointment he would be ordered to do so by the Divorce Court and could then be committed for contempt if he failed to comply. On this ground also the appointment is invalid.

Reference has been made to a passage from Lord Redesdale's judgment in *Vane* v. *Lord Dungannon* (1) as showing that motive is immaterial. In Chance on Powers, vol. ii., p. 446, it is suggested that caution is necessary in adopting this doctrine. It is difficult to distinguish between motive and purpose. But to render the exercise of a special power invalid "it is enough that the appointor's purpose and intention are to secure a benefit for himself; per Lord Parker in *Vatcher* v. *Paull* (2); and compare *Rowley* v. *Rowley* (3) and *In re Wright.* (4) Here the evidence is clear that Sir Ernest Cochrane wished the 50,000*l.* fund to go equally among his children. That was his original offer and the agreement ultimately entered into was only made under the stress of his anxiety to obtain his freedom to remarry. The actual appointment in 1912 was made in pursuance of this agreement and because Sir Ernest Cochrane

(1) 2 Sch. & Lef. 118, 130.
(2) [1915] A. C. 372, 378.
(3) (1854) Kay, 242, 262.
(4) [1920] 1 Ch. 108.

was advised he would be compelled to carry out. An appointment made pursuant to an agreement which the appointor thinks binding is invalid. It makes no difference that such an agreement is in fact not binding at any rate in the case of a testamentary power: *Palmer* v. *Locke* (1); *In re Bradshaw* (2); the reason being that the power is fiduciary: see *In re A.* (3)

C. W. Turner in reply. The only cases really bearing on the question are *Rowley* v. *Rowley* (4) and *In re Wright.* (5) In both cases the exercise of the power was for the corrupt motive of obtaining a money benefit to the donee. There was no corrupt motive in this case. There is no reported case in which a benefit other than a money benefit has been treated as a ground for invalidating an appointment. It may be that benefits, other than pecuniary, to the appointor will invalidate the appointment. Here however the purpose was to benefit the child of the first marriage. Sir Ernest Cochrane admitted in evidence that he was devoted to the child and desired to provide for her future. It is not unnatural that he should appoint a very large part of the 50,000*l.* fund to the only child he then had.

Brydges for the trustees. *Cur. adv. vult.*

April 27. SARGANT J. delivered the following written judgment: The plaintiff here seeks to have it declared that an irrevocable appointment in her favour, which was made in the year 1912 by her father the defendant Sir Ernest Cochrane, is a valid and effectual appointment; and that a subsequent appointment made by Sir Ernest in the year 1920 is invalid and inoperative, so far as it purports to declare void or defeat, supersede, vary or prejudice the earlier appointment. The substantial question is whether the earlier appointment was or was not what is termed a fraud on the power under which it purported to have been made, or, in other words, whether in all the circumstances of the case the power was or was not

(1) (1880) 15 Ch. D. 294.
(2) [1902] 1 Ch. 436.
(3) [1904] 2 Ch. 328.
(4) Kay, 242, 262.
(5) [1920] 1 Ch. 108.

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exercised by Sir Ernest " for a purpose or with an intention beyond the scope of or not justified by the instrument creating the power " : see the definition by Lord Parker in *Vatcher* v. *Paull.* (1) [His lordship then stated the facts as set out above and continued.] It may be that on the strictest view of the matter the action should have been limited to one for the perpetuation of testimony since the rights in question are reversionary only. But those acting for the infant defendants as well as the next friend of the plaintiff—I ought to add the plaintiff herself, as she is now twenty-one years of age—are desirous that the matters in dispute should be settled forthwith; and this course is, in my judgment, a beneficial one for all parties concerned, and accordingly I have thought the case a proper one in which to exercise the power vested in the Court of proceeding by way of declaratory judgment with regard to future rights.

The actual appointment to the plaintiff being admitted, the first question that arises is whether it is for her to show affirmatively that it was made in good faith and in proper exercise of the power in the will, or for the infant defendants to show that it was made improperly and in fraud of the power. The infant defendants have in their favour on this point both the great inequality of the appointment actually made to the plaintiff and also the terms of the subsequent deed poll of October 4, 1920, which might perhaps be argued to afford an expression of Sir Ernest's views having a weight equal to that of the original appointment. But, nevertheless, I think that when once the original appointment to the plaintiff is admitted as having been made, and as being on the face of it an appointment within the powers expressly given to the appointor, it is for those who seek to impeach the appointment to make out a case for doing so. It is of the highest importance that a solemn act, such as that comprised in the indenture of April 11, 1912, should have an undoubted prima facie validity, and should not be liable to be set aside merely on the ground of the apparent capriciousness or improvidence of its contents or by reason of the

(1) [1915] A. C. 372, 378.

execution of subsequent appointments containing declarations by the appointor, such as those in the deed poll of October 4, 1920. And indeed it is clear that any such subsequent written declarations are not in themselves evidence that the Court can receive of the state of mind of the appointor at the date of the previous appointment or of the purpose with which that appointment was made.

The onus then being on the infant defendants, they seek to discharge it in ways which are clearly indicated in an amendment of para. 6 of their defence, which was communicated to the plaintiff's advisers some little time before the hearing of the action, was not objected to by them at the hearing, and has, as of course, been allowed by me. In the first place they say that the appointment to the plaintiff was made as part of the terms of an agreement for the compromise of the claims of Lady Cochrane for permanent alimony and to avoid proceedings by her to have that alimony fixed by the Court. Alternatively they say that the appointment was agreed to be made for the purpose of inducing Lady Cochrane to apply to the Court to have the decree nisi made absolute, and in the belief that otherwise she would not make the application. And as a further alternative, they say that the appointment was made through the belief of the defendant that, if he did not make it, he would be guilty of contempt of Court, and for the purpose of avoiding the penalties that such contempt would entail. And they say that in any of these three alternatives the appointment is bad, as being made not bona fide for the benefit of the appointee, but to secure a benefit for the appointor or avoid a risk to him.

The first of these three alternative defences cannot, in my judgment, be sustained. It is no doubt true that by conducting a negotiation, and entering into a bargain, which related not only to the permanent alimony or maintenance to be secured to Lady Cochrane but also to the appointment to be made to the plaintiff, Lady Cochrane and her advisers ran a certain risk of invalidating the latter part of the transaction ; and that it would have been far safer and better

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that any stipulations or arrangements with regard to the first part of the negotiation should have been kept quite separate from those with regard to the latter part. But on the other hand, I do not think that the simultaneity of the negotiations as to the two parts of the transaction are necessarily fatal, if it is reasonably clear that the arrangements as to the appointment were not in fact affected by those as to the maintenance. It was after all very natural that, when Lady Cochrane was making terms for a separate establishment for herself and the child of whom she had the custody, she should desire that the permanent future of her child should also be reasonably provided for. And I cannot see that any inference necessarily arises that Sir Ernest's intentions to provide for the future of his daughter were influenced by the claims of his wife for maintenance. Had there been any indication that Lady Cochrane proposed to accept a smaller provision for herself out of Sir Ernest's own property, on the understanding that Sir Ernest would make a specially large provision for the plaintiff out of the 50,000*l.* trust fund, the case would have borne an entirely different complexion. But the whole course of the negotiations indicates that Lady Cochrane was asking simultaneously for an increase in the provision for her own maintenance which Sir Ernest had originally proposed out of his own property, and for a still larger increase in the provision for her daughter, both out of Sir Ernest's own property and out of the capital of the 50,000*l.* trust fund. And I cannot come to the conclusion that in acceding, as he did at an early stage, to the very large appointment desired for his daughter, Sir Ernest was in any way seeking to gain a pecuniary benefit for himself by way of reducing the provision which he had to make out of his own property either for Lady Cochrane or for the plaintiff. In coming to this conclusion I have not overlooked the provision in the terms of settlement, under which after Sir Ernest's death the income on the part of the 50,000*l.* trust fund appointed in favour of the plaintiff operates in relief of the income which he has to provide for her out of his shares in Cantrell &

Cochrane, Ld.—a provision which illustrates the danger involved in bringing into a negotiation of this sort the two elements of a dealing with the appointor's own property and a dealing with a trust fund by means of the exercise of a limited power of appointment. But no stress was laid on this feature of the arrangement by Mr. Romer on behalf of the infant defendants; and I do not think that in fact this provision operated on Sir Ernest's mind or formed an element in inducing him to make an extremely large appointment in favour of the plaintiff. All through the transaction, as I judge him, he was much more occupied with what was to affect him immediately and in his lifetime, than with what would affect the 50,000*l.* trust fund or his estate after his death.

The second alternative defence to which I have referred is a much more formidable one. It is abundantly clear that Sir Ernest was desperately anxious that Lady Cochrane should proceed to have the decree nisi made absolute at the earliest possible moment, so that, as he put it in his evidence, he should regain his freedom and be able to marry again. And I am also convinced that Mr. Walter Lumley was well aware of this extreme anxiety, and probably of the reason for it, and that this formed an important element in the negotiations. The terms of the letter of May 8, 1911, the circumstances of the final signature of the terms on May 31, the letters of that date which Mr. Walter Lumley caused Sir Ernest to sign at his office, and the extraordinary promptitude with which the application to have the decree made absolute followed on the signature of the terms of settlement, all point in the same direction. And this view is strikingly confirmed by a passage in one of the affidavits filed on behalf of Lady Cochrane on the application to the Court to confirm the terms. For in para. 17 of his affidavit sworn on November 29, 1911, Mr. Walter Lumley stated in the most definite terms that his client, Lady Cochrane, had instructed him not to apply to make the decree absolute until the future of herself and her child had been properly assured. It is true, indeed, that when this passage was put to Lady

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Cochrane in cross-examination, she did not remember having given these instructions. But she admitted that she must have had Messrs. Fowler & Co.'s letter of May 8, 1911, shown to her, and have realized at that time that they were making it a term on behalf of Sir Ernest that the decree should be made absolute. And further she had been in bad health at the time, her recollection of the whole transaction was admittedly very defective, and she had left herself entirely in the hands of Mr. Walter Lumley and was bound by his action.

But beyond this there is the direct evidence of Sir Ernest himself as to his own mental attitude at the time, and the purpose for which he agreed to the bargain. Some objection indeed was taken by Mr. Maugham to the reception of this evidence, and at the time I allowed it to be given merely de bene esse and subject to that objection. On reflection, however, I am convinced that the evidence was admissible, whatever comments might be made as to its value. In the words of the late Lord Bowen, the state of a man's mind, if ascertainable, is as much a fact as the state of his digestion. And here the evidence is being tendered not on behalf of Sir Ernest but on behalf of his children, so that there is no personal objection to the evidence such as may sometimes occur when the question is whether a purchase or transfer in the name of another was intended by way of advancement or not.

Dealing then with this evidence, I ought to state in the first place that I am convinced that Sir Ernest was trying to tell the truth to the best of his recollection; but on the other hand he was obviously vague and confused as to a good deal that had occurred, and I think that his recollection has been somewhat coloured by the great desire which he has obviously been feeling for some time past that the striking inequality between the provision for his two families should be put right. I am unable for instance to accept as proved his statement that between April 4 and May 4, 1911, he met Mr. Walter Lumley casually, and that Mr. Lumley positively insisted on the 25,000*l.*

appointment as a sine qua non, and that it was for this reason that this term of the arrangement was taken as settled in the proposals of May 4 and was never afterwards discussed or objected to in terms. I think Sir Ernest's dates on this point cannot be relied on, and further that at this distance of time he may very likely be confusing something communicated to him by Mr. Fowler, or even some general impression, with something said to him direct by Mr. Lumley; and that therefore no reliance can be placed on this part of Sir Ernest's evidence. And I do not think that at the time of the negotiations Sir Ernest attached anything like the same comparative importance to the question of the appointment, as he has since done and now does. It seems to me that he was a weak man, self-indulgent, and liable to be carried away by the passions of the moment, and that he was more impressed by that which was about to affect him personally, and immediately, such as the proportion of the shares which he was to transfer as security, than by what would merely affect a possible future family on his death.

But on the other hand there can be no doubt that Mr. Walter Lumley, for Lady Cochrane, was attaching great importance to obtaining a good permanent provision for the plaintiff, and as part of that provision an appointment for her of a very large proportion of the 50,000*l.* trust fund. And I believe Sir Ernest's general evidence that he was aware of the uncompromising nature of Mr. Lumley's demands on behalf of Lady Cochrane; that he realized on May 31 that in the language he attributes to Mr. Lumley's clerk (who by the way was not called, and whose absence was not explained) "it was that or nothing"; that he feared—and I think not without reason—that unless he gave way the decree nisi would not be made absolute; and that he ultimately signed the terms of settlement most reluctantly and for the purpose of obtaining his freedom. It is in relation to this view of the matter that the extraordinarily preferential treatment of the plaintiff, as compared with any future children, acquires importance. The difference in her favour is so great as to markedly support the view that

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it was due not to any special affection entertained for her by Sir Ernest (particularly at a time when he was contemplating remarriage) but to the insistence of Mr. Lumley on behalf of Lady Cochrane.

That a petitioner who has obtained a decree nisi for the dissolution of marriage should whether directly or through a legal adviser threaten to decline to have the decree made absolute, and should use this threat as a lever for the purpose of securing larger pecuniary provision from the respondent would, in my judgment, be a most unpleasant and regrettable incident, and would, I think, if brought to the notice of the Divorce Court, be visited with severe reprobation. But, as Mr. Lumley is dead and has no opportunity of explanation, it is obviously undesirable that I should express any definite opinion as to whether he did in fact go as far as this, unless it were absolutely necessary to do so for the purposes of my present decision. Now this I think is not the case. The really vital question is not the precise limit to which Mr. Lumley went, but the state of Sir Ernest's mind at the time of the signing of the terms of settlement, and the purpose with which he signed them. And as to this I am convinced that Sir Ernest thought, whether rightly or wrongly, that it was a necessary condition of obtaining his freedom that he should accept wholly and entirely and without any modification the terms of settlement as presented to him on May 31, including, of course, the very important term as to the appointment to be made to the plaintiff, a term which, as I have already shown, was contrary to his original wish and had obviously been pressed on him by Lady Cochrane and her adviser.

Now, in these circumstances, can the bargain in the terms of settlement be upheld, so far as relates to the proposed appointment of the 50,000*l.* trust fund? In my judgment the answer must be in the negative. Had Sir Ernest agreed to make the appointment for the purpose of obtaining some pecuniary advantage for himself, there is no doubt that the agreement would have been bad. And no difference can, in my judgment, be made by the fact that the advantage at

which Sir Ernest was aiming was one of another kind—namely, freedom to remarry. Such an advantage, though less sordid than the other, is just as much a personal advantage, and just as alien from the purposes for which the power of appointment was entrusted to him. It was obviously contrary to the intention of the creator of the trust that Sir Ernest should bind himself antecedently to give an enormous preference to the child of his first marriage over any children of a subsequent marriage, and should do so, not in the bona fide exercise of a discretion as between the two families, but for the purely personal reason of obtaining an immediate release from his existing marriage.

In the view which I have taken of the second alternative defence it is unnecessary to deal with the third alternative defence as a substantive defence. But I have still to consider whether, although the plaintiff cannot justify the agreement to make the appointment, she can nevertheless succeed in upholding the validity of the appointment itself as actually carried out by the indenture of April 11, 1912. This must, I think, depend upon whether the actual appointment was the result of a fresh and independent exercise of discretion by Sir Ernest for the legitimate purposes of the power confided to him, or was merely the execution and completion of a bargain which had already been arrived at for an illegitimate purpose. As to this the facts in my judgment admit of but one interpretation. It is of course quite true that Sir Ernest's main objection to the completion of the transaction was founded on the increase of security which had been wrung from him on May 31, and that this was the ground on which he relied in opposing the confirmation of the terms of settlement by the Divorce Court. But even after this objection had been dealt with and adjusted in Sir Ernest's favour, he was still most reluctant to execute the necessary deeds. He only proceeded to do so after receiving the advice from Mr. Grazebrook which I have already stated; and the letter from Messrs. Fowler & Co., of March 8, 1912, which I have also read, put this reluctance on record in the most definite

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and formal manner. Some reliance indeed was placed by Mr. Maugham and Mr. Turner on a passage in that letter which disclaimed any desire to commit a fraud on the power of appointment. But I have to regard here facts and not expressions of pious intention, however sincere. No doubt no one desired that what they did should amount to a fraud on the power and be impeachable accordingly. But they did intend, though as to Sir Ernest most reluctantly and under stress of circumstance, to carry out the arrangements which had been made and confirmed by the Court; and they carried out that intention, in spite of the doubt that had been definitely expressed as to the validity of a very important part of the transaction.

My conclusion then is, as to this part of the case, that the actual appointment amounted at the best to no more than the formal carrying out and completion of an illegitimate agreement to appoint, and is at the best in no better case than the original agreement itself. Indeed, there are grounds for deciding, were it necessary, that, even if the original agreement were unimpeachable, the appointment itself was vitiated by the circumstances in which it was executed. For this part of the terms of settlement could never have been specifically enforced, and Sir Ernest had always a locus pœnitentiæ down to the very moment of the execution of the appointment. This being so, regard must be had to his state of mind and the purpose for which he was appointing down to the last moment preceding the actual execution. And though by that time Sir Ernest had attained his original purpose of freedom to marry again, he realized and made it clear that he realized, that he was exercising his power not for the purposes for which it was confided to him, that is for what he then considered to be in the bona fide interests of his issue present and future, but under the stress and compulsion of a bargain, the breach of which might involve him in unpleasant consequences.

In the result then I propose to declare that the appointment of April 11, 1912, was invalid and void. I note Sir Ernest's offer in the course of the hearing to ensure that the plaintiff

should take a share equal to that of each of his other children, and I hope that he will take steps to give effect to that offer; but the matter is not one as to which I ought to put him on any terms.

The question of costs has given me a good deal of difficulty. The question in issue had necessarily to be determined at some time or other between the plaintiff and the infant defendants; and so far as they are individually concerned it would be hard that any costs should have to be paid by any of them, or by any person acting on their behalf, whatever the actual decision. On the other hand, though Lady Cochrane and Sir Ernest Cochrane have been directly or indirectly responsible for the difficulties which have caused this action, Lady Cochrane has been before the Court merely as the next friend of the infant and Sir Ernest is hardly a necessary party to the action at all, so that it would scarcely be fair to make a personal order against either of them for payment of costs. On the whole I propose to allow the costs both of the plaintiff and of the infant defendants and of the defendant trustees out of the 50,000*l.* trust fund, the costs of the trustees being, of course, taxed as between solicitor and client. Sir Ernest will suffer quite enough in being left to bear his own costs, and losing the income during the rest of his life on that portion of the trust fund which is applied in paying the other costs.

Solicitors: *E. F. Turner & Sons; Fowler, Legg & Young; Lanfear, Tanner & Mackenzie.*

H. C. G.

C. A.
1922
ASTBURY J.
March 24, 28, 29.
C. A.
May 30.

UPJOHN *v.* MACFARLANE.

[1921. U. 1218.]

Emergency Legislation—Landlord and Tenant—Lease under Seal—Breach of Covenant—Forfeiture—Recovery of Possession—Discretion of Court—Reasonableness — Evidence — Relevance — Negotiations before Lease — Tenant's Offers at Trial—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 5.

In breach of an express covenant in a lease under seal a tenant underlet part of a house without his landlord's previous written consent (which consent could not be withheld in the event of a respectable and responsible tenant being introduced). On discovering the breach the landlord forfeited the lease and claimed possession. The house was within the Rent Restrictions Act, 1920.

At the trial the tenant proved that he only took the lease in the bona fide belief induced by the landlord's house agents during the negotiations that they had obtained the landlord's consent to his underletting part of the house from time to time, which consent they knew was a sine qua non to his taking the lease.

On learning at the trial that the landlord had given no consent to actual underletting, but had only given the tenant permission to have some one to live with him, the tenant at once offered to give vacant possession in nine months' time, or sooner if he could obtain other accommodation, and not to underlet again without the landlord's consent, and in the meantime to pay over one-half of the under-tenant's rent.

The landlord refused these offers and demanded immediate possession:—

Held, by Astbury J., that the circumstances under which the lease was taken were necessarily and directly relevant to the question whether it was "reasonable" to make an order for possession under s. 5 of the Rent Restrictions Act, 1920, which gave the Court full judicial discretion in the matter; and having regard to the fact that the tenant only took the lease in the belief, induced by the landlord's house agents, that the landlord had expressly consented to partial underletting, and taking into consideration the tenant's offers, and the absence of any suggestion of structural alteration, or against the respectability or responsibility of the under-tenant, or of any real injury to the landlord, it would not be "reasonable" to order possession.

Benabo v. *Horseley* [1920] W. N. 299 applied.

Barrow v. *Isaacs & Son* [1891] 1 Q. B. 417, and *Kelly* v. *White*; *Penn Gaskell* v. *Roberts* [1920] W. N. 220 distinguished.

On appeal the Court of Appeal, by consent, discharged the order of Astbury J. and made an order in accordance with the terms agreed upon by the parties.

WITNESS ACTION.

Early in 1917 the defendant Macfarlane and his wife were

seeking for a house large enough to accommodate themselves and the wife's two sisters-in-law with their families and furniture, while their husbands were at the war. The defendant Macfarlane was a civil servant in the Local Government Board, and being very much occupied with his work there, the arrangements were left to his wife. Acting as his agent she interviewed estate agents at Hove who had been instructed to find a tenant for the plaintiff's house, 83 St. Aubyns, Hove, for which the rent was 70*l*.

She told the agents that she could not afford so large a house on her own account, but that her sisters-in-law would bring their families and furniture and pay part of the rent, in which case she could take the house for three years.

The agents told her that they thought the plaintiff would not let under five years, and on March 24, after seeing the plaintiff, they wrote to the wife stating that they had had an interview with the plaintiff and there was "no difficulty in the way as regards your requests except that he will not let for less than 5 years certain." They added: "you will of course have the option of subletting to a suitable tenant." The wife understood the latter words to refer to a subletting of the whole house.

On March 26 the wife replied: "I am sorry [the plaintiff] insists on a 5 years term. We are, however, prepared to take the house for 5 years provided that if, after my sisters-in-law who are staying with me probably for the next 3 years have left me and I find it impossible to keep on the house alone, [the plaintiff] will permit me to take steps to get some one to take their place. If he will not give his consent to such an arrangement will you kindly take immediate steps with regard to 21 Medina Villas as I do not wish to lose more time."

The Court held on the evidence that by the words "get some one to take their place" the wife meant "get some one to occupy a portion of the house and to pay a rent for so doing" and that the plaintiff's agents were perfectly aware that that was her meaning.

On March 28 the agents replied that they had told the plaintiff "the proposal you mention as to having some one

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to live in the house should your sister-in-law leave" and that they felt sure he would make no objection to any such reasonable arrangement.

On the same day they wrote to the plaintiff stating that the wife "will agree to a 5 years tenancy if you will allow her to have someone else to live with her should her sister-in-law who is coming to the house with her leave after 3 years" and pointing out that it was a request that a tenant need hardly make, as of course a tenant could have a relation to live with her, and they concluded that the plaintiff would have no objection to the defendant Macfarlane and his wife having relations to live with them during the whole tenancy, if they so desired.

On March 29, after a telephonic communication with the plaintiff, the agents wrote to the wife stating that the plaintiff "has no objection to your having some one to live in the house with you as you suggested in your letter."

On the same day the plaintiff wrote to the agents stating that he had no objection whatever to the wife "having a friend to live with her" and on March 31 the agents forwarded a copy of this letter to the wife.

On April 21 a lease under seal was executed, by which the plaintiff let the house to the defendant Macfarlane for five years from May 11, 1917, and afterwards from year to year at a rent of 70*l*. The lease was determinable by either party at the end of the fifth or any subsequent year on six months' notice. The lessee covenanted not to "assign underlet or part with the possession of the said premises without the previous written consent of the landlord such consent not to be withheld in the event of a respectable and responsible tenant being introduced or any part thereof" and there was the usual power of re-entry on breach of covenant. The words "without the previous . . . . introduced" were an alteration inserted in the draft in the wrong place as above and copied in the engrossment accordingly.

The defendant Macfarlane executed this lease in the belief that the plaintiff's consent to subletting a part of the house from time to time had already been given as arranged with

the plaintiff's agents. He thought he was only precluded from subletting the whole house.

The sisters-in-law came with their families and furniture and had separate establishments on separate floors, each paying 2*l.* 10*s.* a month under verbal arrangements.

One sister-in-law left in July, 1918, and the other in February, 1919. The wife then believing she was entitled to do so applied to the agents as previously arranged and obtained a new tenant Halford for the two upper floors, and by a tenancy agreement of March 20, 1919, these two floors were let by the defendant Macfarlane to Halford for three years from March 25, 1919, at 65*l.* rent including rates and taxes.

Halford was allowed to give up his tenancy at the end of 1920, and by a tenancy agreement of March 25, 1921, the wife, presumably as her husband's agent, let the lower part of the house to the defendant Driscoll for a term of twelve months, and if continued after such term then from year to year at a rent of 150*l.*, the landlord paying all rates and taxes.

On June 17, 1921, the plaintiff called at the house. The defendant Macfarlane and his wife were out, but the door was opened by Driscoll's servant and the plaintiff became aware of his tenancy.

On June 18, 1921, the plaintiff's solicitors wrote to the defendant Macfarlane expressing the plaintiff's surprise at the breach of covenant and stating that in consequence thereof the plaintiff terminated the lease and requested immediate possession, in default of which ejectment proceedings would be at once commenced.

On June 20 on receipt of the above letter the wife replied: "If you will refer back to your correspondence before the agreement was signed in 1917 you will find that your client gave me permission for my sisters to share my house, and therefore I have in no way broken my agreement."

On June 21 the plaintiff's solicitors replied that they had not at the moment got the correspondence, but were instructed that the plaintiff had given no licence to assign underlet

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or part with the possession of the premises or any part thereof nor had it been applied for, and they understood that the house had been converted into two flats and the lower part let to Driscoll.

This was a mistake, as there had been no structural alteration except the fixing of a new sink.

On June 23 the wife replied that the plaintiff's letter stated that he had no objection to her sisters sharing the house, that the house had not been made into two flats, and that she had no intention of complying with the demand for possession.

Further correspondence followed in which the defendant Macfarlane relied on the arrangement made with the plaintiff's agents before signing the lease, and declined to give possession.

The plaintiff first heard of the Halford tenancy on July 18, 1921, when the defendant Macfarlane's wife showed him all over the house.

On November 9, 1921, the plaintiff commenced this action against Macfarlane and Driscoll for possession. As against the defendant Macfarlane he also claimed mesne profits from March 25, 1921, when the last rent was accepted, to June 20, 1921, when the defendant received the notice of forfeiture and demand for possession, and double value from the latter date until delivery of possession.

The defendant Macfarlane relied on the arrangement made with the plaintiff's agents before the lease was signed, and counterclaimed for rectification.

The defendant Driscoll alleged that after the writ was served he had pointed out that his term ran out on March 25, 1922, but that with his landlord's consent he was quite willing to vacate the premises as soon as he could obtain other premises. In these circumstances he submitted that he was not a necessary party, and as against him the action ought to be dismissed with costs.

Micklem K.C., *Jolly* and *J. A. Reid* for the plaintiff. The lease is under seal, and there is a clear breach of the covenant

against underletting. Such a breach is expressly excepted from the relief provisions of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14, and the lease was validly forfeited on June 20, 1921. The Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 1, entitles the plaintiff to double value since that date. The onus however is clearly on the defendant Macfarlane to make out his claim to rectification.

Bovill for the defendants. The claim for double value fails on two grounds: (*a*) The notice of forfeiture is not equivalent to a notice to quit. The term is not determined until the landlord enters or gets an order for possession. Until then there is no holding over and the Landlord and Tenant Act, 1730, does not apply. (*b*) Even if the Act applies to a notice of forfeiture the holding over must be wilful and contumacious and not under a bona fide claim of right: *Swinfen* v. *Bacon*. (1)

[ASTBURY J. You need not trouble about double value.]

In that case I will at once call my evidence in support of my claim to rectification. I shall also rely on the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (2), and contend that in the circumstances it is not reasonable to make an order for possession.

[Evidence on both sides was then given as to the negotiations before the lease and it became clear that though the defendant Macfarlane and his wife believed they had obtained the plaintiff's consent to subletting part of the house, the

(1) (1861) 6 H. & N. 184, 846.

(2) This Act provides as follows:—

Sect. 5, sub-sect. 1: "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies . . . . shall be made or given unless—

(*a*) any . . . . obligation of the tenancy . . . . has been broken . . . . and, in any such case as aforesaid, the Court considers it reasonable to make such an order or give such judgment."

Sub-sect. 2: "At the time of the application for or the making or giving of any order or judgment for the recovery of possession of any such dwelling-house, ... the Court may adjourn the application, or stay or suspend execution on any such order or judgment, or postpone the date of possession, for such period or periods as it thinks fit, and subject to such conditions (if any) in regard to payment . . . . of arrears of rent, rent, or mesne profits and otherwise as the Court thinks fit . . . ."

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plaintiff had not in fact given any such consent or authorized his agents to do so.]

Bovill. On this evidence I must drop the claim for rectification. But in exercising its discretion under s. 5 the Court must decide whether it is reasonable in all the circumstances to make an order for possession: *Benabo* v. *Horseley.* (1) On the facts now disclosed it is clearly not reasonable.

Micklem K.C., *Jolly* and *J. A. Reid* for the plaintiff. The evidence as to the prior negotiations is only admissible on the claim for rectification. (2) That claim being abandoned the evidence is wholly irrelevant.

[ASTBURY J. It is relevant to the question of discretion under s. 5. How can I possibly disregard the fact that the defendant Macfarlane's wife thought she had obtained the plaintiff's express permission to do exactly what she and her husband have done?]

She only really obtained permission to have some one to live with her. She either misunderstood or forgot the terms of this permission. That is not a ground of relief: *Barrow* v. *Isaacs & Son* (3); *Eastern Telegraph Co.* v. *Dent.* (4)

Sect. 5 merely gives the Court a judicial discretion to be exercised on judicial grounds: *Kelly* v. *White* (5); *Penn Gaskell* v. *Roberts* (5); *Waller & Son* v. *Thomas.* (6)

Bovill. The defendant Macfarlane offers to give vacant possession at Christmas, or sooner if he can obtain other accommodation, and not to underlet again without the plaintiff's consent. He also offers in the meantime to pay over one-half of Driscoll's rent.

Micklem K.C. I cannot accept those offers as I require possession by midsummer at the latest and s. 8 precludes me from accepting half of Driscoll's rent. It cannot be reasonable to allow a continuing breach of this nature to go on till Christmas, and in all the circumstances it is unreasonable

(1) [1920] W. N. 299.
(2) See *Henderson* v. *Arthur* [1907] 1 K. B. 10.
(3) [1891] 1 Q. B. 417, 428.
(4) [1899] 1 Q. B. 835.
(5) [1920] W. N. 220.
(6) [1921] 1 K. B. 541, 549, 553.

to refuse the plaintiff his legal right to immediate possession.

Bovill in reply. *Kelly* v. *White* (1) and *Penn Gaskell* v. *Roberts* (1) were decided under the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), which did not contain the special suspensory provisions of s. 5, sub-s. 2. The Increase of Rent, &c. (Amendment), Act, 1919 (9 & 10 Geo. 5, c. 90), s. 1, sub-s. 2, which contained similar provisions was not referred to; possibly because it only mentioned conditions as to payment of "rent or mesne profits" and did not specifically mention "arrears of rent."

ASTBURY J. [after stating the facts and holding that the circumstances under which the lease was taken were necessarily and directly relevant to the question whether it was reasonable to make an order for possession under s. 5 of the Rent Restrictions Act, 1920, which was the only question he proposed to determine, continued:] As far as the claim for double value is concerned I should in any case decline to order anything of the kind, as there has been no wilful or contumacious breach of covenant or holding over by the defendant Macfarlane. [His Lordship then read s. 5, sub-ss. 1, 2, of the Rent Restrictions Act, 1920, and continued:] Although the defendant Macfarlane has committed a breach of the covenant in fact contained in this lease, it has been committed in perfect innocence and in the belief and upon the faith that he had obtained the express permission of the plaintiff to do what he has done, and in circumstances in which it was made plain to the plaintiff's agents, that, unless that were so, he would not have entertained the taking of this house at all. He has now learned the true facts of this case. He knows now that the plaintiff did not personally know of, or assent to, the arrangements exactly as made between the agents and his wife, and he has in my opinion very fairly offered to give up possession next Christmas, in the belief that it will be

(1) [1920] W. N. 220.

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impossible for him to find alternative accommodation before that date. He has offered that, if he does find such alternative accommodation sooner, he will give up possession as soon as he finds it, and he has further offered to pay the plaintiff one-half of the rental paid to him by Driscoll. This offer the plaintiff has refused, but I intend to take it into account in considering whether I should exercise the discretion which I unquestionably have under s. 5 of the Rent Restrictions Act, 1920.

Further, the defendant Macfarlane has undertaken, now that the position has been made plain to him, not in the future to sublet any portion of this house to any other person or persons without the plaintiff's consent.

For reasons which I need not go into, I feel myself unable to order any rectification of this lease, and the counterclaim must be dismissed.

With regard to the claim for possession, I decline, in the circumstances, to make any such order at all. The defendant Macfarlane has taken this lease in circumstances which, now that they are known to the plaintiff, would make it, in my opinion, grossly inequitable for him to attempt to rely upon his legal rights, if any, under the Act. There has no doubt been a breach of covenant. It has, however, not only been an innocent one, but it has been one which has been induced by the conduct of the plaintiff's own agents, and upon the faith that that which constitutes the breach was expressly authorized by the plaintiff himself as so stated by his agents. In these circumstances I am of opinion that I am not only entitled but bound to exercise the discretion given to me under s. 5 of the Rent Restrictions Act, 1920.

Various authorities have been cited, and properly cited on behalf of the plaintiff, with the object of showing that I have no such discretion as is available in this case. I do not agree.

In *Barrow* v. *Isaacs & Son* (1) the headnote says: "The lessees underlet part of the premises without obtaining or asking for the lessor's consent. The underlease was prepared

(1) [1891] 1 Q. B. 417.

by their solicitor, who omitted to look at the head lease, and forgot that it contained the covenant not to underlet without consent. Both the lessees and their under-lessees were respectable and responsible persons, and no injury was done, or likely to be done, to the lessor by reason of the underlease, nor could he have had any valid objection to it if his consent had been asked. In an action by the lessor to recover possession of the premises for breach of the covenant :— Held, that the omission to ask the lessor's consent was not a mistake in respect of which the Court would grant the lessees equitable relief against forfeiture for breach of the covenant, and therefore that the plaintiff was entitled to succeed in the action." That case has no bearing whatever on the Rent Restrictions Act, 1920, and, if it had, the present case is entirely differentiated from it by the fact that the breach of covenant sued upon in this case was induced by the act of the plaintiff's agents and did not result from a mere mistake committed on the part of the tenant and his adviser.

In *Kelly* v. *White* (1) and *Penn Gaskell* v. *Roberts* (1) the rents of the two tenants were in arrear, and their landlords gave them notice to quit. The county court judge in the first case gave judgment for possession in fourteen days, but stayed execution so long as the tenant should continue to pay the current rent and the arrears at the rate of 1*l.* per week, the rent being then in arrear to the amount of 12*l.* or thereabouts. In the second case there was twelve months' rent in arrear, and the county court judge made a similar order, except that he inserted no provision for the payment of arrears. The Divisional Court held that the learned county court judge had exceeded his powers, that his discretion to stay execution must be exercised judicially, and that he had created a new tenancy of indefinite duration, and that the Increase of Rent Act, 1915, gave the Court no power to grant relief against ejectment to tenants who were in arrear in payment of their rent. In other words, it was held that the discretion which I am called upon to exercise was not open under the express terms of the Act in those cases.

(1) [1920] W. N. 220.

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In *Benabo* v. *Horseley* (1) a landlord claimed to recover possession on the ground that the defendant was twelve weeks in arrear with her rent. A. T. Lawrence J. said: "When the case came again before the county court judge he would have to take into consideration sub-s. 1 of s. 5 of the 1920 Act, and decide whether it was reasonable in all the circumstances to make an order for possession. He would have to take into consideration not only the fact that the Act had not been complied with by the non-payment of rent, but also every other matter which could guide him, including the position of the tenant and also of the landlord."

Taking all the circumstances in this case into account, I exercise my discretion under s. 5 of this Act, and I refuse to make an order for possession in this case for the following, among other reasons:—

In the first place, the breach of covenant is not only of a trivial nature and one that has not injured, and cannot injure, the plaintiff in any way at all; but it was committed, as I have tried to explain, under what the defendant Macfarlane believed, and was entitled to believe, was the express authority obtained from the plaintiff before this defendant was willing to agree to take a five years' tenancy of this house.

Secondly, I refuse on the ground that, as soon as the defendant Macfarlane has learned that the plaintiff did not in fact give the assent in the exact sense put forward by his agents, he has at once offered an undertaking, which I accept, not to commit any further breach of covenant in this respect.

Thirdly, he has offered, although I am not at all sure that he is bound to do so, to give up possession either next Christmas or sooner if he can find alternative accommodation. He has also offered to pay the plaintiff one-half of Driscoll's large rent. The plaintiff has refused to accept those offers.

Lastly, it is not suggested that Driscoll is not a respectable and responsible tenant, nor is it suggested that any alteration except the sink has been made in the internal structure of this house, or that the plaintiff has been in any way injured by any acts complained of on the part of the defendants.

(1) [1920] W. N. 299.

In these circumstances, I think that it would be grossly unfair to the defendants to allow this claim to succeed, if I have any means of preventing it, and, in my judgment, I have ample.

I dismiss this action and I dismiss the counterclaim, and, instead of making an order to set off costs, I make no order as to the costs of the plaintiff or the defendant Macfarlane. The defendant Driscoll must pay his own costs.

G. R. A.

The plaintiff gave notice of appeal.

May 30. The case was now mentioned to the Court of Appeal.

Micklem K.C. and *Jolly* for the plaintiff stated that the parties had agreed that the judgment of Astbury J. should be discharged (except as regards the counterclaim) and that judgment for possession should be entered for the plaintiff on his undertaking not to enforce it until after June 24. The defendant Macfarlane was to be ordered to pay mesne profits at the rate of 70*l.* per annum from March 25, 1921, until he gave up possession. Each party was to pay his own costs of the action and counterclaim.

Bovill for the defendants assented.

THE COURT (Lord Sterndale M.R. and Scrutton and Younger L.JJ.) made the order subject to its being prefaced by "By consent."

Solicitors: *Theodore Goddard & Co.; William Henry Bellamy.*

W. I. C.

EVE J.

1921

Nov. 16, 17, 18, 22, 23, 24, 25, 28; *Dec.* 21.

1922

Jan. 11.

HULLEY *v.* SILVERSPRINGS BLEACHING AND DYEING COMPANY, LIMITED.

[1920. H. 3227.]

Easement—Riparian Owners—Pollution of Stream—Prescription—Lost Grant—Married Woman—Period of Prescription—Alteration of User—Increase of Burden—User contrary to Statute—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *ss.* 2, 7—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 4, 10—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 2.

On October 5, 1920, the plaintiff, a riparian owner of a mill and premises situate on the banks of a natural stream, commenced an action against the owners of bleaching and dyeing works higher up on the same stream, for an injunction to restrain the defendants from a continued pollution of the waters of the stream. The main defence was a plea of a prescriptive right to pollute, enjoyed as of right for twenty years, alternatively, a right by virtue of a lost grant. For some years during the prescriptive period claimed a predecessor of the plaintiff was a feme covert who had married in 1884 and her husband died in 1909 :—

Held, applying *In re Lady Hastings* (1887) 35 Ch. D. 94 and *Lowe* v. *Fox* (1885) 15 Q. B. D. 667; 12 App. Cas. 206, that a married woman married since the passing of the Married Women's Property Act, 1882, was released from her former disability of coverture so as to be made capable of resisting a claim to easements under the Prescription Act, and that therefore s. 7 of that Act, which provided that the time during which any person otherwise capable of resisting any prescriptive claim should have been . . . . a feme covert should be excluded in the computation of the prescriptive period, did not apply.

But *held*, further, on the facts proved :—

(1.) That as the easement had not been enjoyed as of right by a predecessor of the defendants who occupied the mill during some months at the beginning of the twenty years it had not been enjoyed as of right during the full statutory period, nor could a grant be presumed.

(2.) That the change in position of the defendants' outfall for their effluent to a spot 130 yards nearer to the plaintiff's boundary was an alteration of the user which adversely affected the plaintiff;

(3.) That the progressive increase in the plant of the defendants' mill and in the volume of water polluted, which continued to be noxious down to the present time, was destructive of the certainty and uniformity essential for the measurement of the user by which the extent of the prescriptive right to pollute was to be ascertained : *Millington* v. *Griffiths* (1874) 30 L. T. 65;

(4.) That the prescriptive easement claimed being contrary to the provisions of the Rivers Pollution Prevention Act, 1876, ss. 3 and 4, no lost grant could be presumed : *Neaverson* v. *Peterborough Rural Council* [1902] 1 Ch. 557.

Held, therefore, that the plaintiff was entitled to an injunction to

restrain the defendants from discharging into the stream any noxious liquids so as to pollute the water of the stream running through or past the plaintiff's land, to the damage or injury of the owners or occupiers of the same; and an inquiry would be directed as to damages.

THE writ in the action was issued on October 5, 1920.

The plaintiff, Walter Hulley, was the owner of freehold hereditaments and premises known as Pool Bank Mill, at Buglawton, near Congleton, in the county of Chester, situate upon the banks of a natural stream or brook known as Timbersbrook, and was a riparian proprietor in regard to the said stream. The conveyance of the property to him was dated May 20, 1920.

The defendants were the owners of a mill and works known as the Silversprings Bleaching and Dyeing Works situate higher up the stream than Pool Bank Mill, and the defendants carried on the business of bleaching and dyeing. The plaintiff alleged in paras. 4 and 5 of his statement of claim that the defendants in the course of their business wrongfully discharged into the said stream foul and noxious matter from their works, and effluent from their filter beds, and water containing chemical and colouring matter used for dyeing and bleaching whereby the water flowing past the plaintiff's premises was polluted and rendered impure and unfit for use in the plaintiff's business of a cotton doubler for which a good water supply was essential.

The plaintiff had spent 5000*l.* in making alterations at Pool Bank Mill and in fitting up plant and machinery, but had been unable to commence his said business in consequence of the wrongful pollution of the water by the defendants. As riparian owner the plaintiff claimed to be entitled to the full and uninterrupted flow of the stream through his premises in its natural and unpolluted state, and asked for an injunction to restrain the defendants, their directors, managers, servants, and agents from discharging or permitting to be discharged from their works, or from their filter beds into the natural stream any foul or noxious matter or liquids so as to pollute or render impure the water of the stream, and damages.

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The defendants, by their defence, denied certain of the plaintiff's allegations and did not admit the allegations as to discharging noxious matter into the stream, but if they had done any of the alleged acts they denied that the water flowing through the plaintiff's premises had ever been or was now polluted or rendered impure for use in any business of the plaintiff.

By para. 6 of their defence the defendants said that they as owners and occupiers of their premises had in respect thereof the right to do the acts complained of and thereby to pollute and render impure the water flowing in the stream past the plaintiff's premises by reason of the defendants and their predecessors in title having enjoyed such right as of right and without interruption for a period whereof the memory of man runneth not to the contrary, or alternatively by virtue of a grant by deed from all necessary parties which had been lost or destroyed by accident, or alternatively for a period of twenty years next before the commencement of the action.

In the reply of the plaintiff to this claim of prescription he said that one Mary Jane Barrow, his predecessor in title, was married on June 4, 1884, to one Lister Smith who died on January 11, 1909, and reliance was placed on s. 7 of the Prescription Act (2 & 3 Will. 4, c. 71), and it was contended that the period from June 4, 1884, to January 11, 1909, during which such owner of the plaintiff's premises was under coverture, ought to be excluded in the computation of the period of twenty years' enjoyment of the right to pollute alleged by the defendants.

Sect. 7 of the Prescription Act provided "that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending . . . . shall be excluded in the computation of the periods hereinbefore mentioned. . . . ."

Witnesses were called on both sides. It appeared that about three months before October, 1900, one Thomas Royle, the defendants' immediate predecessor in title, started

bleaching and dyeing at the mill and commenced to pollute the water of the stream.

The following further relevant facts, stated by the Court to have been clearly established by the evidence, are taken from the judgment: 1. When bleaching and dyeing were first started, the contents of the bleaching kiers and dyeing vats were emptied by Mr. Royle, the then owner of the mill, direct into the stream, without any attempt to filter or purify them. This was done surreptitiously, and not under any claim of right, Mr. Royle's own evidence being that he "took the liberty of turning the first few kiers loose into the brook." He adds: "There was such a strong flow of water, I thought it would be away and not noticed; we had not got any filter beds, and if we did any work at all we had to take the liberty. I did something I thought I was not entitled to do. I did not claim to be entitled to pollute the brook"; and when a little later he is asked about a complaint made by the District Council he says he "told them a tale," in other words an untruth, in attributing the polluted condition of the brook to a defective pipe. 2. Within a few weeks after Royle had started work, a pony belonging to a farmer whose land abutted on the stream was poisoned by drinking the water, and Royle paid compensation to the owner. 3. Between August and October, 1900, a trench was dug and filled with cinders and used as a filter for the kier and dye vat contents before they were poured into the stream. Its use probably intercepted some of the solid matter, but did not materially improve the character of the effluent. 4. Prior to October 5, 1900, and for some considerable time thereafter, certainly down to 1903, possibly 1906, the polluting elements were discharged into the stream close to the mill, and at a spot some 130 yards higher up the stream than that at which the effluent is now discharged. Royle did not acquire the land on which the present outlet exists until May, 1901. 5. The defendants, who acquired the premises from Royle in June, 1901, installed a better system of filtration in 1903, and in 1905–6 a still more elaborate plant was erected. Both of these installations were placed on the land purchased by

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Royle in 1901. The evidence is inconclusive upon the point whether the outlet made in 1903 was in the same place as the one made in 1906, and still in use. Some additions have been made to the purification plant since 1906. 6. The bleaching and dyeing plant in the defendants' mill has been considerably increased since their purchase in 1901, and the volume of pure water abstracted from the stream and returned to it in an impure condition has been gradually increasing, and is now enormously greater than it was at the date of the defendants' purchase. 7. The unfiltered contents of the kiers and dye vats discharged by Royle direct into the stream, and probably those also discharged through his first filter bed, were more noxious and of a more poisonous and polluting character than is the effluent normally discharged by the defendants after full treatment in the purifying plant, but the pollution caused by the defendants is at all times more continuous than was any pollution caused by Royle, and the defendants are down to the present time still discharging into the stream, and not merely on occasions or as the result of accident, liquid of a noxious and polluting, and sometimes of a poisonous, nature. 8. The defendants have from time to time made payments to, erected fences and in one case laid on an alternative water supply for, riparian proprietors on the stream who have protested against and made claims for damages in respect of the pollution caused by their works. The payments in some cases were stated in the receipts to be "without prejudice," but there are several receipts proved in which no such words are to be found. No payment or other consideration has ever passed from the defendants to the plaintiff or any of his predecessors.

Courthope Wilson K.C., *C. E. R. Abbott*, and *David Bowen* for the plaintiff. The plaintiff, as a riparian owner, is entitled to have the water of the stream flow down to his property as it has been accustomed to flow, subject to the ordinary use of it by upper proprietors: *John Young & Co.* v. *Bankier Distillery Co.* (1); Gale on Easements, 9th ed., pp. 203, 279.

(1) [1893] A. C. 691, 698.

The defence is a claim to a prescriptive right to pollute the stream claimed as of right and without interruption under s. 2 of the Prescription Act: Carson's Real Property Statutes, 2nd ed., p. 4. We contend, first, that the user was contentious, and not as of right. Before October, 1900, when Royle first commenced to pollute the stream, he never claimed to do so as of right, and he made subsequent payments to other riparian owners as compensation for damage.

In *Sturges* v. *Bridgman* (1) the principle of prescription is stated by Thesiger L.J.: "Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, nec vi, nec clam, nec precario." Here there were repeated interruptions in the enjoyment: *Eaton* v. *Swansea Waterworks Co.* (2) The user was also surreptitious as well as contentious: *Dalton* v. *Angus.* (3) A second objection is that this right to pollute could not have had a legal origin, being contrary to the provisions of the Rivers Pollution Prevention Act, 1876, s. 4.

The proviso at the end of s. 4 does not affect the present case, as the pipe conveying the noxious liquid did not exist in 1876: *Butterworth* v. *West Riding of Yorkshire Rivers Board* (4), where Lord Macnaghten said that a prescriptive right to foul a stream could not avail against an Act of Parliament which said that nobody should foul a stream: *Neaverson* v. *Peterborough Rural Council* (5); Goddard on Easements, 8th ed., p. 243. Similar cases have arisen under Fishery Acts: *Foster* v. *Warblington Urban Council* (6); *Owen* v. *Faversham Corporation.* (7)

Thirdly, the right claimed is not certain, as the outfall was changed to some 130 yards nearer to the plaintiff's premises, and the defendants have not proved that this does not affect

(1) (1879) 11 Ch. D. 852, 863.
(2) (1851) 17 Q. B. 267.
(3) (1881) 6 App. Cas. 740, 781.
(4) [1909] A. C. 45, 54.
(5) [1902] 1 Ch. 557.
(6) [1906] 1 K. B. 648.
(7) (1908) 73 J. P. 33.

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the plaintiff: *McIntyre Brothers* v. *McGavin*. (1) This alteration lessened the action of the air and the stream upon the effluent.

Fourthly, the burden was also increased on the servient tenement by the increase in the plant and the volume of the noxious effluent. Prescription cannot be claimed for something which is continually increasing and varying. In order to establish a prescriptive right the enjoyment must be certain and uniform: Theobald's Law of Land, p. 167; *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (2); *Millington* v. *Griffiths* (3), where Keating J. said that where the pollution had gone on increasing the excess would defeat the prescription.

Fifthly, when all the circumstances are considered no lost grant can be presumed: *Livett* v. *Wilson* (4); *Gardner* v. *Hodgson's Kingston Brewery Co.* (5); *Jones* v. *Williams* (6); *Hollins* v. *Verney* (7); *Lyell* v. *Lord Hothfield*. (8)

Sixthly, having regard to s. 7 of the Prescription Act the time when Mrs. Smith, a feme covert, was in possession of the plaintiff's mill cannot be computed in the twenty years. She was married in 1884, and her husband died in 1909, and so no title under prescription can be made out by the defendants. There is no direct authority on this point, but an analogous case arose under the Statute of Limitations (21 Jac. 1, c. 16), s. 7: *Lowe* v. *Fox*. (9)

That was the converse of the present case. For these reasons the title by prescription for twenty years fails and the plaintiff is entitled to the injunction claimed.

Gover K.C. and *Stafford Crossman* for the defendants. The last point taken goes to the root of this action. But s. 7 of the Prescription Act does not apply to a woman married after the passing of the Married Women's Property Act, 1882. For the purpose of resisting a claim under the

(1) [1893] A. C. 268, 274.
(2) (1866) L. R. 1 Ch. 349.
(3) 30 L. T. 65, 68.
(4) (1825) 3 Bing. 115.
(5) [1903] A. C. 229.
(6) (1837) 2 M. & W. 326.
(7) (1884) 13 Q. B. D. 304, 315.
(8) [1914] 3 K. B. 911, 916.
(9) 15 Q. B. D. 667, 676.

Prescription Act she is a feme sole, though before 1882 she was only considered so as to her separate estate. She is now a feme sole for all purposes of property under the Act of 1882, ss. 1 and 2. The object aimed at by s. 7 of the Prescription Act must be considered, as it was to preserve the rights of persons incapable of making the grant and it dealt with persons of such legal incapacity as an infant, idiot, etc. There is no authority directly in point but *In re Lady Hastings* (1), *Weldon* v. *Neal* (2) and *Lowe* v. *Fox* (3) throw some light on it by analogy.

Cotton L.J. in *In re Lady Hastings* (4) said that a married woman as to her separate estate was regarded as a fictitious creature. The lady in the present case was married after 1882 and her husband died in 1909. She could have granted an easement and brought an action for trespass. Possibly the reason why this question has never been raised before was because no one thought of disputing the effect of the Act of 1882. The Court can imply the grant which is the basis of prescription: *Roberts & Lovell* v. *James*. (5) As to the first point made on behalf of the plaintiff we do claim as of right to pollute the stream: Carson's Real Property Statutes, 2nd ed., p. 8; Lord Halsbury's Laws of England, vol. xi., p. 262, where it is stated that consent by the servient owner lies at the root of prescription: the enjoyment must be "nec vi, nec clam, nec precario." The payments made to other riparian owners do not affect this plaintiff, to whom no payment was ever made. There was open pollution for twenty years on the evidence, and no one could be ignorant of it who lived on the banks of the stream: *Tickle* v. *Brown*. (6)

The words "as of right" must have the widest sense: Prescription Act, ss. 1 and 2. As to the legal origin of the grant it is said that you cannot prescribe against the provisions of an Act of Parliament. If so there never could be any pollution at all, it has never been suggested that the Rivers Pollution Prevention Act, 1876, has any bearing on the

(1) 35 Ch. D. 94.
(2) (1884) 51 L. T. 289.
(3) 15 Q. B. D. 667.
(4) 35 Ch. D. 94, 104.
(5) (1903) 89 L. T. 282, 287.
(6) (1836) 4 Ad. & E. 369.

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question of prescription. We have never claimed to pollute contrary to that Act. No proceedings under it have ever been taken against us, still less any conviction recorded, and for twenty years we have been under the supervision of the local authority.

Under s. 6 of the Rivers Pollution Prevention Act proceedings are to be taken by the sanitary authority, but the industrial interests involved are to be considered. Sects. 3 and 4, which deal with offences under the Act, have the qualifying words "subject as in this Act mentioned," which applies to s. 6 and introduces the provisions of the Act relating to legal proceedings, so that the offence is not complete until such proceedings have been taken and a conviction pronounced. It is not an offence merely to send in polluted matter. Those proceedings are detailed in s. 10 and the following sections. We submit, therefore, there has been no infringement of that statute.

As to the change of outlet for the defendants' effluent, if the effect of that was to increase the burden on the servient tenement there would be something in the argument for the plaintiff. But the stream at the outlet is the effluent, and the burden is not increased, inasmuch as, according to the evidence, the effluent has been continually improved. The short difference in the distance would make no alteration in the character of the effluent. We can discharge it anywhere provided the burden is not increased. *Crossley & Sons* v. *Lightowler* (1) and *Baxendale* v. *McMurray* (2) show the legal nature of such an easement to pollute. On the general question a lost grant will not be presumed where the grantor is legally incapable of making the grant, but that is not the case here.

The measure of the right is difficult to define. The true test is to consider what the position would be if there had been an express grant, authorizing the amount of pollution which occurred about October, 1900, and that which might reasonably be expected to be turned out in future, having regard to the premises as they then were. In Lord Halsbury's Laws of England, vol. xxviii., p. 452, the modes

(1) (1867) L. R. 2 Ch. 478. (2) (1867) L. R. 2 Ch. 790.

of the acquisition of a right to pollute are set out, and when the right is acquired by prescription any substantial increase in pollution is unlawful.

The real test is not the amount of the effluent but the amount of the poisonous matter sent into it, and here the effluent has gradually improved. There are two Irish cases dealing with increase of pollution: *Blackburne* v. *Somers* (1) and *Traill* v. *M'Allister*. (2)

We submit that no relief can be granted by way of injunction. We have established a right to pollute to a certain extent, and the water of the stream could not have been of any use to the plaintiff for any purpose to which he could put it. The injunction would not help him: *Taff Vale Ry. Co.* v. *Gordon Cumming* (3), and would do us irreparable harm. As to damages, the plaintiff has suffered none, certainly no special damage. The action is unfounded, and should be dismissed.

Courthope Wilson K.C. in reply. The effluent has continued to be offensive down to the present time. The Court cannot presume the enjoyment to be as of right when Royle's evidence is clearly to the contrary: that is an end of the claim of prescription. With regard to the argument on the Rivers Pollution Act, 1876, the words in ss. 3 and 4 " subject as in the Act mentioned " relate to what follows in the concluding portions of those sections, and not to the sections from 10 onwards dealing with proceedings taken under the Act. There is an increase of the burden by the change in the user of the dominant tenement. The measure of the right is the measure of enjoyment: *Wimbledon and Putney Commons Conservators* v. *Dixon*. (4) No limit can be put to the use to which a riparian owner may desire to make of the water flowing past his land.

An injunction is the proper remedy in this case, and we ask for an inquiry as to damages: *Pennington* v. *Brinsop Hall Coal Co.* (5)

Cur. adv. vult.

(1) (1879) 5 L. R. Ir. 1.
(2) (1890) 25 L. R. Ir. 524.
(3) [1909] 2 Ch. 48.
(4) (1875) 1 Ch. D. 362.
(5) (1877) 5 Ch. D. 769.

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Dec. 21. EVE J. [after stating the preliminary facts continued :] The plaintiff has, in my opinion, incontestably established that the defendants in carrying on their business as bleachers and dyers had at the date of the writ, and have since, polluted the water flowing through their premises and thence to the plaintiff's property, and have thereby so sensibly altered its character and quality as to entitle the plaintiff to relief by way of an injunction unless the defendants have satisfied the Court that they have a prescriptive right to do as they have done. And herein lies the substantial question in the action, for the defendants assert by para. 6 of their defence that at the time of the act alleged by the plaintiff, that is to say, the discharge into the stream of foul and noxious matter from their works, they had the right as owners and occupiers of their works to do the said acts and to pollute the said stream and render it impure opposite the plaintiff's premises by reason of their and their predecessors having enjoyed such right as of right and without interruption (and these are the only relevant parts of the plea) by virtue of a grant by deed from all necessary parties since lost or destroyed, or alternatively for a period of twenty years next before the commencement of the action. The defendants, therefore, assert an easement under the doctrine of a lost modern grant, or alternatively under the provisions of the Prescription Act, and in support of both alternatives they have sought to make out an open uninterrupted enjoyment as of right for a period of some twenty and a quarter years before the issue of the writ. They have proved to my satisfaction that at a date some three months or so prior to October 5, 1900, their predecessors in title, having installed a small bleaching and dyeing plant at the mill, theretofore used for purposes not injuriously, or, indeed, at all, affecting the stream, did commence to pollute it, and thereafter he and they down to the present time have continued to pollute it by discharging into it the effluent from their bleaching kiers and dyeing vats.

A number of objections have been raised on behalf of the plaintiff to the defendants' claim to an easement. The

following relevant facts in addition to those I have already stated have been clearly established by the evidence. [His Lordship stated the facts as above set out on eight points.]

Before dealing with the position brought about by the findings of fact which I have enumerated, and the legal results which follow from those findings, I must state my conclusion on a point which was elaborately argued, and which goes to the root of the whole matter, and, if correct, disposes effectually of the defendants' claim under the Prescription Act, though not necessarily of their claim under the fiction of a lost grant.

By s. 7 of the Prescription Act (2 & 3 Will. 4, c. 71) there is to be excluded in the computation of the prescriptive periods therein mentioned the time during which any person capable of resisting any claim shall have been an infant, idiot, non compos mentis, feme covert, or tenant for life, and for some six or seven years out of the prescriptive period relied upon by the defendants one of the owners of the plaintiff's mill was a married woman. It was argued, therefore, that the easement claimed by the defendants has not been enjoyed for the necessary period. But the lady in question was married in 1884, and the defendants contend that by virtue of the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), she never was a feme covert within the meaning and intent of s. 7 of the Prescription Act. By this last-mentioned section it was of course intended to preserve the rights—to the extent therein mentioned—of persons incapable of making the grant on the presumption of which the whole structure of statutory prescription is founded, or of suing to prevent an invasion of their rights and property, and in the category of such persons the feme covert was obviously included in 1832. Whether, apart altogether from the Married Women's Property Act, a married woman possessed of separate property free from any restraint on anticipation would have been regarded in respect of that separate estate as a feme covert within the section, I need not pause to consider, but the judgments in the Court of

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Appeal in *In re Lady Hastings* (1) clearly recognize that in regard to her separate estate the Courts had created an "imaginary creature"—namely, a married woman with the powers of a feme sole, that is to say, a married woman capable of dealing with her separate estate as a feme sole. The effect of the Married Women's Property Act is to add the incidents of separate use to the interest of a woman married after 1882 in all property belonging to her at the date of her marriage or accruing after that event, and by analogy to the "imaginary creature" created in respect of the separate estate prior to the Act one is, I think, entitled to regard a woman married since 1882 as on the same footing in respect of all her property. She is no longer a feme covert, but is in fact discovert—not released from her marriage, but so far released from the former disabilities of coverture as to be made capable of resisting any claim to any of the easements in the Prescription Act mentioned. For these reasons I do not think that s. 7 has any application in the case of a woman married since 1882, and I so hold. This conclusion is, I think, in accordance with the result arrived at, and the judgments pronounced in *Lowe* v. *Fox* (2), in which case it was decided that a woman married after 1882 became discovert within the meaning of the Statute of Limitations (21 Jac. 1, c. 16, s. 7), on the coming into operation of the Married Woman's Property Act, and that time began to run against her from the last-mentioned date.

Reverting now to the findings of fact, I think the following conclusions of law are to be deduced therefrom: (1.) That the easement claimed, in whatever way it may be defined—and in the course of the trial several attempts were made to state its nature concisely—was not enjoyed as of right during the statutory period. It originated with Royle, and unless the period of his working from June to October, 1900, is included, the twenty years had not run when the writ was issued. In the face of his evidence it is, I think, impossible to hold that the easement was ever enjoyed by him "claiming right thereto," and unless the enjoyment was as of right for

(1) 35 Ch. D. 94, 105. (2) 15 Q. B. D. 667; 12 App. Cas. 206.

the full twenty years, no grant can be presumed, nor can the claim under the Act be supported. It is not necessary for me to decide how far the payments and other considerations passing from the defendants to other riparian owners—put in evidence by the defendants themselves—could be used by the plaintiff to negative an enjoyment as of right, but it is difficult to reconcile such conduct with a continuous assertion of a right to inflict the injury for which such payments were made and treated as compensation. (2.) The prescriptive right, if any, was a right to discharge the effluent from the land belonging to Royle in 1900, and not from the land purchased in 1901. The defendants had no right in 1903 or 1906 to bring the discharge to a spot 130 yards nearer to the plaintiff's boundary unless they were in a position to show that the change could not by possibility affect the plaintiff. The onus of proving this rests on the defendants: *McIntyre Brothers* v. *McGavin* (1), and they have not discharged it. The evidence goes to show that in the 130 yards sedimentation and oxygenation would have materially improved the polluting effluent carried down to the plaintiff's land. (3.) The progressive increase in the plant in the defendants' mill and in the volume of water polluted is destructive of that certainty and uniformity essential for the measurement and determination of the user by which the extent of the prescriptive right is to be ascertained. As at present advised, I am of opinion that in view of these increases no prescriptive right to pollute could have been established even if all other difficulties had been overcome: *Millington* v. *Griffiths*. (2) The prescriptive easement claimed is contrary to the provisions of the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75). Each time the defendants cause or knowingly permit to fall or flow into the brook any poisonous, noxious, or polluting liquid proceeding from their works they are, in my opinion, committing an offence under s. 4 of that Act. The words "subject as in this Act mentioned" in ss. 3 and 4 refer to

(1) [1893] A. C. 274, 277. (2) 30 L. T. 65.

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the latter part of each section, and do not, as was urged on behalf of the defendants, qualify the first paragraph of the section by introducing into it the provisions of the Act relating to legal proceedings and make the offence incomplete unless and until an order has been made against the offender to abstain from the commission of the offence. As I read and construe s. 4, the discharge constitutes an offence unless the circumstances can be brought within the second part of the section and the later sections dealing with legal proceedings, that is to say, s. 10 and the following ones, and which are expressly framed for cases where an offence has already been committed, cannot properly be read into the section which creates the offence. The evidence on both sides satisfies me that the defendants have continually, and down to very recent dates in this year, been committing offences against the Act—in other words, that the user on which they rely as establishing the easement is a user contrary to statute. A lost grant cannot be presumed where such a grant would have been in contravention of a statute, and as title by prescription is founded upon the presumption of a grant, if no grant could lawfully have been made, no presumption of the kind can arise, and the claim must fail: *Neaverson* v. *Peterborough Rural Council.* (1)

From these conclusions it follows that in my opinion the defendants have failed in their defence, both on the facts and the law, and in these circumstances the plaintiff is entitled to an injunction to restrain the defendants from discharging from their works into the natural stream any foul or noxious matter or liquids so as to pollute the water of the said stream running through or past the plaintiff's land, to the damage or injury of the owners or occupiers of the same. And there must be an inquiry as to what, if any, damages he has sustained. The defendants must pay the costs down to and including this judgment; subsequent costs will be reserved.

On the application of defendants' counsel the operation

(1) [1902] 1 Ch. 557.

of the injunction was suspended until April 30, 1922, with liberty to apply, and was subsequently further suspended.

Solicitors: *Williamson, Hill & Co., for H. E. Kay, Manchester; G. F. Hudson, Matthews & Co., for H. L. & W. P. Reade, Congleton.*

G. M.

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[1920. C. 3750.]

Local Government—Housing—Building Estate of 3000 *Acres—Beerhouse within Area—Compulsory Acquisition for Purpose of controlling Traffic in Intoxicating Liquor—Powers—Housing of the Working Classes Act,* 1890 (53 *&* 54 *Vict. c.* 70), *Pt. III., ss.* 53, 57, *sub-s.* 1—*Housing of the Working Classes Act,* 1903 (3 *Edw.* 7, *c.* 39), *s.* 11—*Housing, Town Planning, &c., Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 35), *s.* 12, *sub-s.* 1, (*a*), (*b*); *sub-s.* 2.

Under the provisions of the Housing, Town Planning, &c., Act, 1919, the defendants made an order, subsequently confirmed by the Minister of Health, for the compulsory acquisition for the purposes of a scheme under s. 1 of the Act, of 3000 acres for the erection of working-class houses for the accommodation of 120,000 persons. They also proposed to acquire compulsorily a beerhouse within the area with the objects, (1.) of controlling or regulating the traffic in intoxicating liquor on the site, that control to be based on management by some company or association whose servants were not to have a pecuniary interest in the sale of alcohol, and (2.) of providing for the general entertainment and refreshment of the population:—

Held, that the Act contemplated extensive schemes for the provision of working-class houses by local authorities, involving in many cases the acquisition of considerable areas of land and extending even to the creation of a new town; that s. 12, sub-s. 1, treated the land within the selected area as a whole, and as something in the nature of a building estate, and, as incidental to the complete control of the development of the building scheme, empowered the local authority to acquire any houses or other buildings, whether the same were or were not required for use as, or as a site for, workmen's dwellings, or for roads or other purposes mentioned in the earlier Housing Acts; and that that power was not limited to houses which it was proposed to adapt for working-class accommodation under the power to alter contained in the later part of the sub-section.

Upon the above construction of the Act,

Held also, that, subject to confirmation by the Minister of Health, the

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defendants had power under s. 12, sub-s. 1, of the Act to acquire compulsorily the beerhouse in question for the attainment of the objects above-mentioned.

Semble, that both under s. 12, sub-s. 2, of the Act, and under s. 11 of the Housing of the Working Classes Act, 1903, the defendants had a similar power for effecting the like objects.

THIS was an action by the owners and the licensee and occupier of the "Royal Oak" beerhouse in Green Lane, Chadwell Heath, for an injunction to restrain the London County Council from exercising its powers of compulsory purchase in respect of the beerhouse. The material facts were as follows:—

In compliance with the provisions of s. 1 of the Housing, Town Planning, &c., Act, 1919, the London County Council prepared a scheme for the provision of houses for the working classes, under which it was proposed to acquire about 3000 acres (hereinafter referred to as the Dagenham site) lying between Barking and Dagenham in Essex and consisting mainly of market gardens, for the purpose of erecting houses for the accommodation of about 120,000 persons. Within this area there were four beerhouses or public houses, of which one was the "Royal Oak." On the fringe of the area there were other licensed premises. On October 21, 1919, the London County Council made an order for the compulsory acquisition of the lands forming the Dagenham site, specified in the schedule to the order, from which, however, owing to a mistake in the valuer's office, the "Royal Oak" and some cottages adjoining the garden of the "Royal Oak" on the west, were omitted. The other three licensed houses on the Dagenham site were included in the order. This order was confirmed by the Ministry of Health on February 26, 1920. The omission of the "Royal Oak" and the cottages was subsequently discovered, and on August 30, 1920, another order was made for the compulsory acquisition of the "Royal Oak," as well as the cottages and also certain other lands. Owing to the opposition on the part of the plaintiffs this order was confirmed by the Ministry of Health on October 16, 1920, in respect of the lands in question other than the "Royal Oak," without prejudice to the right of the Minister

to confirm the order so far as it related to the "Royal Oak." Subsequently, for the sake of convenience, the London County Council withdrew its application to have this order, so far as it concerned the "Royal Oak," confirmed and made a third order on November 9, 1920, for the compulsory acquisition of the "Royal Oak" and its garden. The value of the freehold with the licence, at the end of September, 1920, was about 7500*l.* This action was then commenced and in consequence of the questions which it raised the consideration of the third order by the Ministry of Health had been postponed.

After the commencement of this action, the plaintiffs offered to the Council that part of the garden of the "Royal Oak" upon which it was proposed to construct a new road and also the other land lying to the west of the site of the road upon which land it was proposed to erect shops, and suggested a method for fixing the price. In November, 1921, the Council, being anxious to proceed with the road, accepted this offer and proceeded to construct these works. In consequence of this arrangement the plaintiffs by their statement of claim only sought to prevent the Council from acquiring compulsorily so much of their premises as consisted of the beerhouse and the land within its curtilage.

From the evidence at the trial it appeared that the defendants had decided to acquire the "Royal Oak" and the other three beerhouses on the Dagenham site with the object of controlling or regulating the traffic in intoxicating liquor on that site, and that that control should be based on management by some company or association whose servants were not to have a pecuniary interest in the sale of alcohol, and that provision should be made for the general entertainment and refreshment of the population.

Maugham K.C., *Gavin Simonds* and *Wrottesley* for the plaintiffs. We submit that under none of the earlier Housing Acts nor under the Housing, Town Planning, &c., Act, 1919, has the County Council power to acquire this public

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house compulsorily. There is no need to purchase it at a prohibitive price or for the whole area of the scheme to be continuous, and the defendants have no power to buy public houses in order to extinguish the licence. Under a general Act, and under s. 92 of the Lands Clauses Consolidation Act, 1845, more land than is required for the authorized purposes cannot be acquired: *Eversfield* v. *Mid-Sussex Ry. Co.* (1) The purpose of s. 12 of the Housing, Town Planning, &c., Act, 1919, is the provision of dwellings for the working classes, and if the "Royal Oak" is not wanted for that purpose, the defendants cannot purchase it: *Lord Carington* v. *Wycombe Ry. Co.* (2); *Gard* v. *London Commissioners of Sewers* (3); *Lynch* v. *London Commissioners of Sewers* (4); *J. L. Denman & Co.* v. *Westminster Corporation.* (5) Those cases show the principle upon which the defendants should act.

[PETERSON J. referred to *Dunhill* v. *North Eastern Ry. Co.* (6)]

Hughes K.C. and *Attwater* for the defendants. This is a single scheme for the acquisition of a large area in compliance with the provisions of s. 1 of the Housing, Town Planning, &c., Act, 1919, and it is essential to such a scheme to have one entire area with control over it and it is most important to have control over the supply of alcohol. Sect. 12 of the Act of 1919, by sub-s. 1, gives additional powers to acquire land and houses, and by sub-s. 2 enlarges the purposes for which they may be acquired, and s. 15 of the Act shows what may be done with them when acquired. The powers must be exercised reasonably and in good faith and not for a collateral object, but the Court will not interfere with a discretion exercised, as in this case, bona fide and with no collateral, sinister or indirect motive: *Galloway* v. *London Corporation* (7); *Stockton and Darlington Ry. Co.* v. *Brown* (8); *Westminster Corporation* v. *London and North*

(1) (1858) 3 De G. & J. 286.
(2) (1868) L. R. 3 Ch. 377.
(3) (1885) 28 Ch. D. 486.
(4) (1886) 32 Ch. D. 72.
(5) [1906] 1 Ch. 464.
(6) [1896] 1 Ch. 121.
(7) (1866) L. R. 1 H. L. 34.
(8) (1860) 9 H. L. C. 246.

Western Ry. Co. (1); *London, Brighton and South Coast Ry. Co.* v. *Truman.* (2)

The purposes of Part III. of the Act of 1890 were to provide "lodging houses for the working classes" and by s. 40 of the Act of 1919 "houses for the working classes" is to have the same meaning. Sect. 57 of the Act of 1890 gives powers for the acquisition of land, and s. 59 gives power to erect lodging houses. Sect. 11 of the Housing of the Working Classes Act, 1903, enlarges those powers and includes a power to provide and maintain any building adapted for use as a shop, any recreation grounds, or other buildings serving a beneficial purpose in connection with the requirements of the persons for whom the dwelling accommodation is provided, and s. 16 of the Act of 1919 gives power to lay out streets and roads and makes provision for the development of the land as a building estate. The acquisition of this public house is to the advantage of the whole scheme and the defendants are justified in acquiring it (*Rolls* v. *London School Board* (3)), for it is most important that all the public houses in this area should be under the control of the defendants. Under s. 11, sub-s. 3, of the Act of 1919, no public inquiry was necessary, but the Minister of Health would have listened to any objection; his functions are administrative and advisory, and not judicial: *Local Government Board* v. *Arlidge.* (4)

Maugham K.C. in reply. This public house is not required for the purposes of the Housing Acts, and the evidence shows that the County Council merely want it for the purposes of controlling liquor traffic which they have no power to do, and which has nothing to do with the development of the estate. If a local authority can purchase a public house under these Acts in order to control liquor traffic, there is no reason why it should not also purchase a church or chapel within the area in order to control the form of religious worship. There is nothing in the Acts which justifies any local authority in spending public money for the purpose

(1) [1905] A. C. 426.
(2) (1885) 11 App. Cas. 45.
(3) (1884) 27 Ch. D. 639.
(4) [1915] A. C. 120.

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of imposing its own views and enforcing its own fads; nor is there anything which shows that the advantage of taking a square site enables it to take property which otherwise it would have no power to take compulsorily. There is nothing in the cases cited on behalf of the defendants which shows that they are entitled to acquire property in a block whether they want it or not, or that any collateral purpose is authorized by the Housing Acts, or that the construction of the Acts rests with them.

Cur. adv. vult.

Feb. 15. PETERSON J. stated the facts as above set out and continued: The plaintiffs' case is that the Council can only acquire the premises for the purposes authorized by the Housing Acts, and that it proposes to acquire the "Royal Oak" for a purpose which is not authorized by those Acts. It is, I think, well established that a local authority or any other body entrusted with statutory powers to acquire compulsorily the land of others for purposes authorized by their special Act can only acquire land for the authorized purposes: see *J. L. Denman & Co.* v. *Westminster Corporation* (1); *Westminster Corporation* v. *London and North Western Ry. Co.* (2); *Rolls* v. *London School Board* (3); *Galloway* v. *London Corporation* (4); *Eversfield* v. *Mid-Sussex Ry. Co.* (5); *Lord Carington* v. *Wycombe Ry. Co.* (6); *Stockton and Darlington Ry. Co.* v. *Brown.* (7) Thus in *Gard* v. *London Commissioners of Sewers* (8) the Commissioners who had statutory powers to improve streets gave notice to treat for the acquisition of the whole of a site of which only a small portion was required by them for the purpose of widening the street, and proposed to make a profit by selling the rest of the land. It was held that they had power to take that part which was required for the purpose of widening the street, but that the purpose for which they proposed to acquire the rest was not authorized by

(1) [1906] 1 Ch. 464.
(2) [1905] A. C. 426.
(3) 27 Ch. D. 639.
(4) L. R. 1 H. L. 34, 43.
(5) 3 De G. & J. 286.
(6) L. R. 3 Ch. 377.
(7) 9 H. L. C. 246, 256.
(8) 28 Ch. D. 486.

the Act which conferred the compulsory powers which they purported to be exercising. On similar grounds it was held in *Lynch* v. *London Commissioners of Sewers* (1) that a power of compulsory purchase for the purpose of widening streets did not authorize the acquisition of land for the purpose of altering levels. Cases such as *Galloway* v. *London Corporation* (2) and *Quinton* v. *Bristol Corporation* (3) are not departures from the general rule. Indeed the decision in *Galloway* v. *London Corporation* (2) expressly recognizes the rule. Both these cases are decided upon the ground that on the true construction of the particular Acts the purposes for which the local authority proposed to acquire the lands in question were authorized.

It is necessary, therefore, to ascertain what are the purposes for which the London County Council proposed to acquire compulsorily the "Royal Oak" and its garden, and whether those purposes are authorized by the Housing Acts. [His Lordship referred to the evidence and continued:] Long before the third order was made the proposed new roads had been planned by the officials of the London County Council, and one of them ran through the garden of the "Royal Oak"; and it was in consequence of the urgent necessity of proceeding without delay with the making of the road and the sewer in it that the Council accepted the plaintiffs' offer in November, 1921. Moreover it appears from one of the plans that shops are to be built on that part of the plaintiffs' garden which lies to the west of the new road. The minutes of the Housing Committee and of the Council show that it was determined to acquire the beerhouse as well as the other three licensed premises within the area which the Council had decided to acquire, for the purpose of obtaining control over all the licensed premises within the area. As appears from the minutes of the Council's meeting of July 6, 1920, the Housing Committee recommended that the Council should acquire the "Royal Oak" and thereby secure control of it. On July 13, 1920, the Council resolved:

(1) 32 Ch. D. 72. (2) L. R. 1 H. L. 34, 43.
(3) (1874) L. R. 17 Eq. 524.

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(1.) That the licences for the sale of intoxicating liquor on premises to be acquired by the Council in connection with the development of the Dagenham site should not be abandoned for the present. (2.) That the supply of refreshments in such licensed premises should be controlled by the Council and that the Housing Committee do report . . . . as to the lines on which they recommend the Council to control such supply and as to any negotiations with the Liquor Control Board and the neighbouring licensing justices. The Council at the meeting of October 19, 1920, considered a report of the Housing Committee which pointed out the difficulties in connection with the Liquor Control Board and at a meeting of October 26, 1920, resolved that the system of control to be exercised by the Council over the existing beerhouses on the Dagenham housing site be based on management by a company or association whose servants will not have a pecuniary interest in encouraging the sale of alcoholic liquors; that such system do provide for the general entertainment and refreshment of the population and that the Housing Committee do report in due course as to the terms and conditions upon which such management can be established. On November 9, 1920, the third order, which dealt exclusively with the "Royal Oak," was made. It is, I think, plain from the record of the meetings of the Housing Committee of the Council that the Council decided to acquire the "Royal Oak" and the other three beerhouses on the Dagenham site with the object of controlling or regulating the traffic in intoxicating liquor on that site. This conclusion was confirmed by one of the witnesses who stated that the Council wanted to acquire these four beerhouses with a view of getting control, and "control" having regard to the rest of his evidence and to the minutes of the Council and of the Committee meant "control or regulation of the supply of alcoholic liquor." Admittedly the Council cannot carry on the business of licensed victuallers, and there is nothing which shows that the Council at any time contemplated doing so. But what precisely is to be done with the beerhouses when they have been acquired has not yet

been determined. The Council, however, has decided that the supply of alcoholic liquor shall be controlled by it and that that control shall be based on management by some company or association, whose servants are not to have a pecuniary interest in the sale of alcohol and that provision shall be made for the general entertainment and refreshment of the population. As the Council admittedly cannot carry on the business of a publican, I cannot suppose that it contemplated that the company or association referred to is to manage the business for the Council; for this would merely mean that the Council would carry on the business by its agent. The Council must, I think, in passing the resolutions of October 26, 1920, have contemplated the lease or sale of the beerhouses, when they had been acquired, to some company or association on terms which would secure that the houses should be managed on lines which would give effect to the desires of the Council. The Council then had a twofold object in acquiring the plaintiffs' premises. It determined to purchase the plaintiffs' beerhouse and garden, intending to use the west part of the garden for a roadway and as a site for shops and to arrange with some company or association to take over the beerhouse and carry on the business there on lines corresponding with the views of the Council which were summarised in the Council's resolution of October 26, 1920. The erection of shops and the construction of roads are authorized by s. 11 of the Housing of the Working Classes Act, 1903, and s. 15, sub-s. 1, of the Housing, Town Planning, &c., Act, 1919. Sect. 45 of the Housing, Town Planning, &c., Act, 1909, however, prohibits the compulsory acquisition for the purposes of Part III. of the Act of 1890 of any land which forms part of any front garden or pleasure ground or is otherwise required for the amenity or convenience of any dwelling house. This section would prohibit the Council from acquiring under its compulsory powers the garden of the "Royal Oak" without acquiring the "Royal Oak" itself. Whether a local authority can insist upon taking the whole of a man's land because it cannot otherwise take a part of it, which it requires, is a question which may have

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to be answered in another case. It may be contended that if a local authority desires to acquire a small portion of a large park for the purposes of the Housing Acts, it cannot in order to surmount the difficulties occasioned by s. 45 take compulsorily the mansion and the rest of the park which are not required for the purposes of the Acts. But whatever the correct answer to that question may be, it is not necessary to consider it in the present case, having regard to the arrangement which was reached in November, 1921, and to the powers conferred upon the London County Council by the sections of the Housing Acts.

The question raised in the action appears to be whether there is anything in the Housing Acts which enables the Council to acquire compulsorily the "Royal Oak" beerhouse and what is left of its garden with the object of controlling the traffic in intoxicating liquor on the Dagenham Estate in the manner which has already been indicated. The material legislation begins with Part III. of the Housing of the Working Classes Act, 1890. By s. 53 of that Act the purposes of Part III. of that Act include the provision of lodging houses and cottages for the working classes. Sect. 57, sub-s. 1, enables a local authority to acquire land for the purposes of Part III. compulsorily by reference to ss. 175 and 176 of the Public Health Act, 1875. Sects. 175 and 176 of the Public Health Act enable a local authority to acquire land for the purposes of the Acts, and provide for the sale of any lands acquired in pursuance of the powers conferred by the Act and not required for the purpose for which they were acquired. This, no doubt, contemplates that a local authority may find that it has superfluous land; but the power to sell relates to land acquired under the powers of the Act and not required for the purposes for which it was acquired; and under s. 175 the local authority is only enabled to acquire lands for the purposes of the Act. The fact that the sections contemplate the possibility that the local authority may in the result have more land than it needs for the authorized purposes and directs that such land shall be sold does not enable a local authority to acquire land

deliberately for a purpose which is not authorized. Sect. 59 of the Act of 1890 authorizes local authorities to erect buildings for the housing of the working classes on land acquired by them. The same section appears to me to imply that the power to acquire land carries with it a power to acquire buildings on the land; for it provides for the conversion of buildings on land acquired into lodging houses for the working classes. But whether that be so or not, I do not find any contrary intention in the Act which prevents the word "land" from including buildings by virtue of s. 3 of the Interpretation Act, 1889.

I will next deal with s. 12 of the Housing, Town Planning, &c., Act, 1919, on which much reliance was placed. Sub-s. 1 declares that the powers of a local authority to acquire land for the purposes of Part III. of the Act of 1890 shall be deemed to include powers (*a*) to acquire any houses or other buildings on the land proposed to be acquired as a site for the erection of houses for the working classes; and (*b*) to acquire any estate or interest in any houses which might be made suitable as houses for the working classes, together with any lands occupied with such houses; and enacts that the local authority shall have power to alter, enlarge, repair and improve any such houses or buildings so as to render them in all respects fit for habitation as houses of the working classes. Sub-s. 1 (*b*) probably was intended to enable the local authority to acquire any kind of estate or interest in houses which are capable of being made suitable as houses for the working classes to meet the suggestion that before this enactment it could only acquire the whole of the house whatever its tenure: s. 57 of the Housing of the Working Classes Act, 1890, and s. 3 of the Interpretation Act, 1889. The material part of sub-s. 1 for present purposes is the power conferred upon the local authority by sub-clause (*a*). The effect of that clause, in my opinion, is that where a local authority has power to acquire land for the purposes of providing dwelling accommodation for the working classes it has power to acquire any houses or other buildings on the land which it proposes to acquire as a site for the erection

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of houses for the working classes. This power is not, in my view, restricted to the acquisition of buildings on the site of which it is proposed to erect houses for the working classes. The Act contemplates extensive schemes for the provision of working class houses by local authorities which in many cases will involve the acquisition of considerable areas of land. Thus under s. 1, sub-s. 2, a scheme must state the number of houses to be provided, the quantity of land required, and the average number of houses per acre; while the proviso at the end of sub-s. 3 provides for the preservation of buildings of architectural, historic, or artistic interest in the area affected by the scheme and for the preservation, as far as possible, of the natural amenities of the locality.

In order to carry out the requirements of the Act it became necessary for the London County Council to prepare a scheme for the acquisition of about 3000 acres and the erection of houses for the accommodation of about 120,000 persons. Such a scheme as this is one for the creation of a new town. It is reasonable enough that a local authority which is bound to acquire an extensive tract of land for the erection of houses for a large community should have power to acquire any houses or other buildings which are within the boundaries of the area selected and that it should have complete control over this area in order to prevent or remove any impediment in the way of complete development of the scheme. Sect. 12, sub-s. 1, in my view contemplates a scheme under which an area has been marked out for the erection of the houses which the local authority is bound to provide under the provisions of the Act. That area is "the land proposed to be acquired as a site for the erection of houses for the working classes." The words "the land" do not refer to the land of each individual owner of land within the area, but refer to the land which the local authority proposes to acquire for the purpose of giving effect to its obligations under the Act. The sub-section deals with houses on "the land proposed to be acquired as a site," not with houses on "land proposed to be acquired as a site," and in my view treats the land within the selected area as a whole, as something in the

nature of a building estate. The section then, in my opinion, gives power to acquire any house which is on any part of the area which it is proposed to take. It is, I think, of no importance for the purpose of this sub-section that the house and its site which it is proposed to take are not required for use as a workman's dwelling or as a site for such a dwelling, or for a roadway, or for other purposes mentioned by the earlier housing Acts. The power is given as incidental to the complete control of the development of the building scheme.

It was somewhat faintly argued that on its true construction sub-clause (*a*) gives power to acquire as a site for the erection of houses for the working classes any houses or buildings on the land proposed to be acquired or to acquire any houses on the land which, that is the houses, are proposed to be acquired as a site for the erection of houses for the working classes. But I am unable to accept this suggestion. A house is not a site for the erection of a house although the land on which it is built may be, nor should I expect to find a power to acquire houses as "a site" instead of "sites."

In my view, then, under the section the London County Council had power to acquire any house on the land which it proposed to acquire as a site for the erection of houses for the working classes, or, in other words, it had power to acquire any house or building on the Dagenham site.

The powers in sub-s. 12, sub-s. 1, to alter or improve "any such houses or buildings so as to render them fit for habitation as houses for the working classes" does not limit the powers conferred by sub-clauses (*a*) and (*b*). This power, in my opinion, applies to houses acquired under either of the preceding sub-clauses; the use of the words "any such houses or buildings" must apply to any which have already been referred to, and it is to be observed that while sub-clause (*b*) mentions only "houses," sub-clause (*a*) mentions "houses or other buildings." But the power to acquire and the power to alter are different and independent powers and it is in my view impossible to hold that the power to acquire conferred by sub-clause (*a*) is limited to houses which

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it is proposed to adapt for working-class accommodation under the power to alter in the latter part of the section. That appears to be the governing idea of the power conferred by sub-clause (*b*). The idea of sub-clause (*a*), as it appears to me, is that the local authority shall be enabled to obtain complete control over the area which it proposes to acquire as a building estate. In my opinion, then, the London County Council had power subject to the approval of the order by the Minister of Health to purchase the "Royal Oak" compulsorily.

There is also a question whether the London County Council had not power to acquire the "Royal Oak" under s. 12, sub-s. 2 (*b*), of the Act of 1919, which enables a local authority to acquire compulsorily land for the purpose of leasing or selling any part of it with a view to the use thereof for purposes which, in the opinion of the local authority, are desirable for the development of the land as a building estate, including the provision of places of recreation and other works or buildings for or for the convenience of persons belonging to the working classes and other persons. For reasons which I have already given the Council's resolution of October 26, 1920, in my opinion, contemplates the lease or sale of the "Royal Oak" to some company or association and in terms contemplates "provision for the general entertainment and refreshment of the population" which inhabits the Dagenham site. If it were necessary to express an opinion on this point, I should be prepared to hold that the London County Council had power to acquire the "Royal Oak" under the provisions of s. 12, sub-s. 2.

Reference may also be made to the provisions of s. 11 of the Housing of the Working Classes Act, 1903. That section enacts that any power of a local authority under the Housing Acts to provide dwelling accommodation or lodging houses shall include a power to provide and maintain with the consent of the Local Government Board, now the Minister of Health, in connection with any such accommodation or houses any building adapted for use as a shop, any recreation grounds or other buildings or land which in

the opinion of the Board will serve a beneficial purpose in connection with the requirements of the persons for whom the dwelling accommodation or lodging houses are provided. The question whether a beerhouse is for the purpose of this section a shop (see per Channell J. in *Savoy Hotel Co.* v. *London County Council* (1)) appears to be one which it is not necessary to determine in this action, for it is a building and if in the opinion of the Minister of Health it will, if acquired, serve a beneficial purpose in connection with the requirements of the persons for whom the dwelling accommodation is provided the local authority with the consent of the Minister of Health has power to provide it. If the Minister considers it desirable that a beerhouse, to be conducted on the most improved lines, should be provided, to meet the wants of the persons who live on the local authority's building estate, the local authority has, in my opinion, under this section to provide it. The method in which it may be provided is not restricted. "Provision" covers the building of a new house or the purchase of one which is already in existence. It is said that the sanction required by s. 11 has not been given, and therefore that the London County Council has no power to make the provision contemplated by s. 11; but order No. 3 is not effective until it has been confirmed by the Ministry of Health, and assuming that I am correct in thinking that the London County Council can acquire this beerhouse if the Ministry of Health is of opinion that the provision of it would serve a beneficial purpose in connection with the requirements of the persons for whom dwelling accommodation on the Dagenham site is being provided and consents to the acquisition, I cannot declare that the London County Council has no power to purchase the house compulsorily or restrain the Council from taking steps to purchase it. If the Minister of Health is of opinion that the "Royal Oak" will serve the kind of beneficial purpose which is mentioned in s. 11, if it is purchased by the London County Council, and confirms order No. 3, the London County Council will, in my view, have power to acquire it compulsorily. The section in fact

(1) [1900] 1 Q. B. 665, 669.

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extends the purposes for which land or buildings can be acquired under the Housing Acts, and authorizes the compulsory acquisition of a building for use as a shop, or of land for recreation grounds or of land and buildings for use in connection with the requirements of the inhabitants of the local authority's building estate, if that use in the opinion of the Minister of Health is beneficial.

I am therefore of opinion that this action fails and should be dismissed with costs.

Solicitors for the plaintiffs: *Witham, Roskell, Munster & Weld.*

Solicitor for defendant Council: *D. P. Andrews.*

R. M.

WOMBWELL'S SETTLEMENT, *Re.* ([1922] 2 Ch. 298; 127 L.T. 295). *Applied. Re* DEWHIRST .. .. [1948] 1 All E.R. 147

PETERSON J. 1922. *March* 28, 29.

In re WOMBWELL'S SETTLEMENT.

CLERKE *v.* MENZIES.

[1921. W. 4597.]

Settlement in Contemplation of Marriage—Trust for Settlor "until the said intended marriage"—Nullity of Marriage—Effect of Decree Absolute—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 3.

By a settlement made in contemplation of marriage a father transferred 25,000*l.* to the trustees of the settlement to be held upon trust for him "until the said intended marriage," and thereafter upon the trusts of the settlement. The marriage took place, but afterwards a decree absolute was made declaring it "to be and to have been absolutely null and void" on the ground of the husband's impotence:—

Held, that "until the said intended marriage" meant a valid and effectual marriage, and that, as the marriage had been declared null and void ab initio, the settlor was absolutely entitled to the settled funds, under the express trust in his favour.

ORIGINATING SUMMONS.

Shortly before the execution of a settlement, dated February 16, 1920, made in contemplation of the marriage of Victor M. Wombwell and Sybil R. Neuman, the defendant, William Menzies, who was the father of Victor M. Wombwell,

transferred to the trustees of the settlement the sum of 25,000*l.*, to hold the same upon trust for him until the marriage, and afterwards upon the trusts of the settlement. In the settlement, after reciting that William Menzies had transferred 25,000*l.* to the trustees "to the intent that the same shall be held in trust for the said William Menzies until the said intended marriage," it was provided that after the said intended marriage the trustees should pay the annual income arising from the 25,000*l.* to Victor M. Wombwell for life "or until some act or event shall be done or happen . . . . whereby if the same income were payable to him absolutely for his life he would be deprived of his right to receive the same or any part thereof in any of which cases as well as on the death of the said Victor M. Wombwell which shall first happen the trust hereinbefore declared for payment to him of the said income shall cease." In that event the income of the trust fund was to be applied for the maintenance, support, or benefit of Victor M. Wombwell, Sybil R. Neuman, and any children of the marriage, as the trustees in their discretion should think fit.

Subject to the before-mentioned trusts "the trust fund and the income thereof or so much as shall not have become vested or applied under any of the trusts or powers affecting the same shall be held in trust for the said William Menzies absolutely." The marriage was solemnised on February 18, 1920. On April 25, 1921, Sybil R. Wombwell obtained a decree nisi annulling the marriage on the ground of her husband's impotence, and the decree nisi, on October 31, 1921, was made absolute. Victor M. Wombwell in July, 1920, was adjudicated bankrupt. Since the bankruptcy the trustees had from time to time made payments for his benefit out of the income of the trust funds.

By s. 5 of the Matrimonial Causes Act, 1859, and s. 3 of the Matrimonial Causes Act, 1878, the Divorce Court, after a final decree of nullity of marriage, may inquire into the existence of ante- or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make orders as to the application of the settled property

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for the benefit of the parties. Neither Victor M. Wombwell nor Sybil R. Neuman (otherwise Wombwell) had applied to the Divorce Court to vary the said settlement.

On December 7, 1921, this summons was taken out by the trustees to determine whether, in the events which had happened, the defendant William Menzies was absolutely entitled to the funds comprised in the settlement and the trustees were entitled to transfer the funds to him; and secondly, if it should be decided that Victor M. Wombwell was the sole object of the discretionary trust, whether his trustee in bankruptcy could require the trustees to pay to him, as such trustee in bankruptcy, the whole or any part of the said income.

Clauson K.C. and *C. J. Farwell* for the settlor. The trustees now hold the funds in trust for the settlor absolutely. The trustees were to hold the funds upon trust for the settlor "until the said intended marriage," which, by the granting of the decree absolute, has been declared void ab initio. The consideration for the settlement having failed the settlement comes to an end, except that the provisions of the Matrimonial Causes Acts, 1859 and 1878, keep it alive for some purposes, and enable the Divorce Court to dispose of the settled funds. Although no limit of time is fixed within which the Court must exercise its powers, the Court in exercising its discretion will have regard to the time which has elapsed before the application was made, and, where there is undue delay, will refuse to interfere: *Benyon* v. *Benyon and O'Callaghan.* (1) Only the parties to the ceremony of marriage can apply to the Court to vary a settlement. Trustees cannot be heard in support of an application to vary a settlement, but they have a right to oppose it: *Corrance* v. *Corrance.* (2) As was said by Vaughan Williams L.J. in *Dormer* v. *Ward* (3): "I find that at the time of the pronouncing of the decree a settlement existed. ... I do not find that the settlement continued in force after the decree. In my opinion this settlement did not do

(1) (1876) 1 P. D. 447. (2) (1868) L. R. 1 P. & M. 495.
(3) [1901] P. 20, 33.

so. But I think the Court has power to make orders with reference to the application of the property settled by the settlement in existence at the time of the decree." This settlement did not continue in force after the decree, and therefore unless the parties apply to vary it the settlor takes an absolute interest in the fund brought into settlement. In *P.* v. *P.* (1) a wife paid to her husband a sum of money as her marriage portion. She afterwards obtained a decree of nullity on the ground of impotence and the Court held that she was entitled, as on a consideration that had failed, to be repaid her marriage portion. A number of authorities were cited in *P.* v. *P.* (1) to the effect that, where there is a settlement in consideration of marriage, if the marriage is shown to be void the settlement is also void. In *Bishop* v. *Smith* (2), a decision not binding on this Court, which was cited in *P.* v. *P.* (1), and not followed, the wife obtained a decree of nullity on the ground of impotence, but the Court held that the marriage was voidable but not void, and that therefore the operation of the settlement was not affected by the decree of nullity. It is submitted that this Court is bound by the decision of the Court of Appeal in *Dormer* v. *Ward.* (3) *In re Garnett* (4) is very similar to this case. By a settlement in contemplation of marriage a father covenanted that if the marriage were "solemnised" his executors would within twelve months from his death pay 25,000*l.* to the trustees of the settlement. The executors paid the money to the trustees, not knowing that the previous day a decree absolute had been made, declaring the marriage to have been null and void on the ground of impotence. It was held that as the marriage had been declared void ab initio the covenant to pay never became operative, and the money must be repaid to the executors of the testator. It is submitted that from and after the decree of nullity the settlement is dead, and it may truly be said that the marriage, a valid and effectual marriage, has never been solemnised. In this case there was no marriage, but merely an irrebutable presumption

(1) [1916] 2 I. R. 400.
(2) (1875) 1 Victorian L. R. 313.
(3) [1901] P. 20.
(4) (1905) 74 L. J. (Ch.) 570.

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of marriage until the decree absolute was pronounced. Subject to anything done by the trustees while the presumption of marriage existed the position now is what it was the moment before the ceremony of marriage took place, that is, the trustees hold the 25,000*l.* upon trust for the settlor.

Ashworth James for Victor M. Wombwell adopted the argument for the settlor, reserving any rights he might have under the discretionary trust in the event of the trustee in bankruptcy proving successful.

Dighton Pollock for Sybil R. Neuman, one of the objects of the discretionary trust, disclaimed all interest in the fund.

Wilfrid Hunt for the trustee in bankruptcy of Victor M. Wombwell. The settlement still subsists. When the marriage ceremony was performed the trusts for the parties to the marriage came into operation, displacing the primary trust in favour of the settlor, and the trustees, in the events that have happened, hold the funds on the discretionary trust for the benefit of Victor M. Wombwell. The settlor reads the clause as if it ran, "until the said intended marriage is consummated." A marriage is voidable on the ground of impotence only at the option of one party, who must be sincere and act without delay. Thus in the case of *A.* v. *B. and Another* (1) there was an attempt to question a marriage as void after the death of one of the parties, Sir J. P. Wilde said: "Impotence does not render a marriage 'void' but only 'voidable.' . . . . Impotency has always hitherto been considered in the Ecclesiastical Courts (and since their abolition in the Divorce and Matrimonial Court), as a matter of personal complaint only. . . . . The Courts have been in the habit of requiring many conditions to be fulfilled before they would grant relief, all of which are inconsistent with the notion that the marriage is absolutely void." In *Dunbar* v. *Dunbar* (2) Warrington L.J. said: "It is quite true that when the decree has been pronounced the marriage is declared to have been void, but it is equally clear that the marriage in such a case is not a void marriage, but a voidable marriage.

(1) (1868) L. R. 1 P. & M. 559, 561, 562. (2) [1909] 2 Ch. 639, 643.

. . . . It is not a void marriage in the sense in which before the recent Act the marriage with a deceased wife's sister was a void marriage. That was no marriage at all, and the parties might just as well, so far as legal consequences are concerned, have lived together without going through any ceremony. The marriage in this case was not void in that sense, and if no proceedings had been taken to avoid it, it would to all intents and purposes in law have been a valid marriage. It was therefore a voidable marriage and not a void marriage." In that case the doctrine of advancement was applied, although, according to Mr. Clauson's contention, the parties were not husband and wife.

In *Turner* v. *Thompson* (1) it was held, on a petition for a decree of nullity, that the marriage was voidable at the instance of the injured party but not void.

In *Elliott* v. *Gurr* (2) the marriage was within the prohibited degrees ; for the husband was the sister's son of the woman's former husband, that is, her nephew by affinity ; but the marriage was not declared void in the lifetime of the parties. The learned judge said : " Now the difference between void, and voidable, is so clear, that no person who ever looked into any elementary book on the subject, is ignorant of it. The canonical disabilities, such as consanguinity, affinity, and certain corporal infirmities, only make the marriage voidable, and not ipso facto void, until sentence of nullity be obtained ; and such marriages are esteemed valid unto all civil purposes, unless such sentence of nullity is actually declared during the lifetime of the parties. Civil disabilities, such as a prior marriage, want of age, ideotcy, and the like, make the contract void ab initio, not merely voidable."

Having regard to these authorities, it is submitted that *In re Garnett* (3) was wrongly, and *Bishop* v. *Smith* (4) was rightly decided. The marriage in the present case being voidable, and not void ab initio, the trusts for the parties concerned came into operation as soon as it was performed, and, as Victor M. Wombwell is now the sole object of the

(1) (1888) 13 P. D. 37.
(2) (1812) 2 Phillim. 16, 18.
(3) 74 L. J. (Ch.) 570.
(4) 1 Victorian L. R. 313.

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discretionary trust, his trustee in bankruptcy is entitled to require the plaintiffs to pay him the whole income from the trust funds.

RUSSELL J. This is a summons to determine whether, in the events which have happened, the settlor is absolutely entitled to the funds which he brought into settlement in contemplation of the marriage of his son Victor M. Wombwell with Sybil R. Neuman; and secondly, if he is not so entitled and Victor M. Wombwell is the sole object of the discretionary trust contained in the settlement, whether his trustee in bankruptcy is entitled to the income arising from the settled funds. Under the settlement the trustees hold the settled funds upon trust for the settlor "until the said intended marriage" and thereafter upon trust to pay the income to Victor M. Wombwell for life, or until his bankruptcy, when the trustees in their sole discretion are to apply the income for the maintenance and benefit of any one or more of the following persons—namely, Victor M. Wombwell, Sybil R. Neuman, and any children of the marriage. In the event of there being no children who should obtain a vested interest under the settlement there is an ultimate trust, as to the settled fund, in favour of the settlor. The marriage was duly solemnised, and, on April 25, 1921, the wife obtained a decree nisi for nullity of marriage on the ground of the impotence of her husband. The form of the decree nisi is, that the marriage in fact had and solemnised "be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in the law whatsoever, by reason of the impotence of the said respondent, and the said petitioner be pronounced to have been and to be free from all bond of marriage with the said respondent." The decree was made absolute on October 31, 1921, when the "President on the application of the said petitioner by his final decree pronounced and declared the said marriage to be and to have been absolutely null and void, and that the petitioner was and is free from all bond of marriage with the said respondent."

The question I have to decide is, who is entitled to the trust fund. The settlor contends that he is entitled to it, either under the express trust in his favour, or under a resulting trust, because the settlement has ceased to exist, as no valid and effectual marriage took place. Sybil R. Neuman disclaims all interest in the fund, Victor M. Wombwell supports the claim of the settlor, and his trustee in bankruptcy, who is the effective opponent of the settlor, contends that the settlement must be treated as existing, because in fact a marriage did take place. The decision in *Bishop* v. *Smith* (1), an Australian case, is opposed to the contention of the settlor. In that case the Court held that the trusts of that particular settlement still continued after a decree of nullity on the ground of impotence had been pronounced. That decision is not binding upon me, although, of course, I treat it with all respect, neither is the decision in the Irish case of *P.* v. *P.* (2), where the wife, after obtaining a decree of nullity on the ground of impotence, was held to be entitled, as on a consideration that had entirely failed, to be repaid by her husband her marriage dowry. The Australian decision was brought to the attention of the judges in the Irish case, and their reasoning appeals to me as sound rather than that of the Australian judges. The result of a decree of nullity is that not only are the parties not now married but they never were. There never was any valid marriage. The point came before the Court of Appeal in the case of *Dormer* v. *Ward* (3) on the question of varying a settlement after a decree of nullity had been pronounced. The Court consisted of Lord Halsbury L.C., A. L. Smith M.R. and Vaughan Williams L.J., who delivered the judgment of the Court. In the course of the judgment the following expressions appear :—"In other words, the Court must read in the settlement child or children as meaning a child or children who are not issue of a marriage, and who are, therefore, illegitimate, and must read marriage as including a connection which is no marriage at all, being a voidable marriage

(1) 1 Victorian L. R. 313. (2) [1916] 2 I. R. 400.
(3) [1901] P. 20, 32.

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which has been avoided." "I find that at the time of the pronouncing of the decree a settlement existed between Mr. and Mrs. Ward. I do not find that the settlement continued in force after the decree. In my opinion this settlement did not do so. But I think that the Court has power to make orders with reference to the application of the property settled by the settlement in existence at the time of the decree, and I think that, on a motion for an order for the application of property settled, the Court, in the case of a decree of nullity, must, for the purpose of the order (if the section is to be applied to cases of nullity at all), read the settlement as if extended and varied so as to make the words 'parties whose marriage' connote parties whose marriage was no marriage. . . . . " "I think, for reasons which I have already given, that the Court in the case of a decree of nullity can and ought to vary the settlement, treating for the purpose of the order that which was no marriage as if it had been a valid marriage, and make the order for application for the benefit of a woman not a wife of this yearly sum of 200*l.*" Those expressions show that, in the opinion of the judges of the Court of Appeal, a marriage which has been annulled on the ground of impotence was never a marriage at all, although, no doubt, it is recognized as valid until one of the parties to it takes proceedings to annul it.

In 1905 the very point that I have to decide came before Kekewich J. in the case of *In re Garnett.* (1) That was a case where, in a settlement made in contemplation of his daughter's marriage, a father covenanted that if the marriage were "solemnised" his executors would within twelve months of his death pay 25,000*l.* to the trustees of the settlement. The marriage took place in 1891. The father died in 1894, and, in June, 1896, his executors paid over the 25,000*l.* to the trustees, not knowing that on the previous day a decree had been made absolute declaring the marriage to have been and to be null and void on the ground of the impotence of the husband. The question was who was

(1) 74 L. J. (Ch.) 570, 572.

entitled to the 25,000*l.*, the plaintiff asking for a declaration that the covenant by the testator to pay the 25,000*l.* never became operative, by reason of the decree of nullity of the marriage, and that such sum and the investments representing the same were never in fact subject to the trusts of the settlement. In the course of his judgment Kekewich J. said: . . . . "I am prepared to decide this case upon the particular meaning and effect of the settlement before me. It is a settlement made on the marriage of Mary Beatrice Richardson, one of the daughters of Joseph Richardson; and he entered into a covenant in contemplation of the intended marriage, that if such marriage were solemnised his executors were, within twelve calendar months after his death, to pay to the trustees of the settlement 25,000*l.* He bound himself to pay that money if the marriage was solemnised, but not otherwise. . . . . Counsel for the legal personal representative of the daughter says on behalf of those claiming under her will that the trustees are to hold this money upon the trusts of the settlement, and all that it means is that the ceremony of marriage shall be gone through." The learned judge then referred to the judgments of Knight Bruce and Turner L.JJ. in *Chapman* v. *Bradley* (1), and to the form of the decree nisi in the Divorce Court and continued: "Therefore there never was a marriage, although the ceremony was gone through, and the parties lived together as man and wife after that date. The marriage is pronounced null and void ab initio. Not only are they not now married, but they never were. In other words, as Turner L.J. says in *Chapman* v. *Bradley* (1), 'there has never been any valid marriage.' I have nothing to do with the trusts of the settlement. There never was any obligation to pay under the settlement, as the covenant never took effect."

In my opinion this case is not distinguishable from *In re Garnett.* (2) Here the 25,000*l.* is transferred to trustees "to the intent that the same shall be held in trust for the said William Menzies until the said intended marriage." In my opinion that means a valid and effectual marriage. The

(1) 4 D. J. & S. 71. (2) 74 L. J. (Ch.) 570.

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other trusts of the settlement would only come into operation after that valid and effectual marriage had taken place. The decree of the Divorce Court establishes the fact that there never was a marriage and therefore the settlor is absolutely entitled to the funds comprised in the settlement under and by virtue of the express trust in his favour. It is quite true that no claim could be made by him for the return of the payments made by the trustees during the time when the validity of the marriage was not questioned, for, unless and until the wife intervened, all parties were bound to treat the marriage as valid and effectual. It is not in my power to prevent the Divorce Court, in the exercise of their powers under the Matrimonial Causes Acts, 1859 and 1878, making an order to vary the settlement, but, as both the former spouses disclaim any intention of making such an application, and r. 95 of the Divorce Division limits the time for application to one month from the time at which it could first have been made, such an application would appear to have small chance of success five months after the decree was made absolute. There is no necessity to limit my order in any way because of the powers of the Divorce Court under s. 5 of the Matrimonial Causes Act, 1859, and I hold that, in the events that have happened, the defendant William Menzies is absolutely entitled to the funds in the settlement and the trustees are entitled to transfer those funds to him.

Solicitors: *Burton, Yeates & Hart; M. A. Jacobs; Williams & James; Lewis & Lewis.*

J. B. B. M.

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SARGANT J.

1921

May 24, 25, 26; *June* 14.

[1920. N. 1088.]

Restrictive Covenant—Breach—Building Estate—Conveyance by Trustees of remaining unsold Land to beneficial Owner—Subsequent Assignment of outstanding Benefit of Covenant—Reunion of legal and equitable Rights in Beneficiary.

Under the will of C. E., who died in 1860, the S. estate was vested in trustees in trust for S. C. J. From 1860, onward, the S. estate was developed as a building estate, restrictive covenants to preserve the residential character of the estate as a whole being taken from the respective purchasers of portions of the estate from time to time sold in the course of its development. In 1881 part of the estate was sold and conveyed by the trustees and S. C. J. to R. F., who covenanted with the trustees to erect dwelling houses thereon and use the same as dwelling houses only. In accordance with that covenant a dwelling house known as No. 223 C. Road, was erected on part of the land so conveyed to R. F. In 1884 the trustees conveyed the then remaining unsold portions of the S. estate to S. C. J., but did not at the same time assign to her the benefit of the restrictive covenants taken from R. F. and purchasers of other portions of the estate sold from time to time. In 1893 N. became absolutely entitled under the will of S. C. J., of which he was thereby appointed an executor, to the unsold portions of the S. estate. The defendants J. were assigns of R. F., the original covenantor, having recently purchased No. 223, and they thereupon, in spite of the restrictive covenants of which they had notice, commenced to convert No. 223 into a shop. In 1921 the representative of the last surviving trustee of the will of C. E. assigned to N. the benefit of the restrictive covenants entered into with the trustees by purchasers on sales made from time to time of portions of the estate, including the covenants by R. F. contained in the conveyance of 1881.

In an action by N. against J. to restrain the breach of those covenants:—

Held (1.), that the effect of the assignment to N. in 1921 of the benefit of the covenants, in conjunction with the conveyance in 1884 of the then remaining unsold portions of the estate, was to reunite in N. as legal rights those equitable rights which S. C. J. originally possessed under the trusts of the will of C. E.; (2.) that it was not incumbent on the plaintiff to show that the covenants imposed by the conveyance of 1881 were, in the first instance, intended to be for the benefit of any particular portions of the S. estate retained by the covenantees, but it was sufficient to show, as the plaintiff had in fact shown, that those covenants were intended to be enforceable for the purpose of preserving the general residential character of the estate as a whole; and (3.) that it is not incumbent upon a plaintiff, on each occasion of enforcing such covenants,

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to show that the covenants are, in fact, beneficial to any portions of the retained estate.

An injunction was, accordingly, granted to restrain the defendant from using No. 223 as a shop in breach of the covenant aforesaid.

ACTION with witnesses.

The plaintiff was the owner in fee simple of the unsold portions of an estate known as the "Shipcote Estate," situate at Gateshead and just south of the River Tyne. The Shipcote Estate, of which Mr. Cuthbert Ellison was the former owner, had, about the year 1860, and onward, been developed as a building estate on the freehold system, that is, by successive sales of the fee simple of portions thereof to purchasers (generally builders) on the terms that they should erect houses thereon. On these successive sales it was always stipulated by the vendor that the houses should be in accordance with plans approved by the vendor and further that various restrictive covenants should be entered into as to user, which varied to some extent in various parts of the estate, but were aimed in general at preserving the general amenities and character of the neighbourhood, both for the convenience of the residents in the houses that were from time to time built and for the beneficial development of the portions of the estate that were from time to time unsold.

Cuthbert Ellison, who died in 1860, by his will in the same year devised his real estate, which included the "Shipcote Estate," to the use of trustees their heirs and assigns upon and for such trusts intents and purposes as the testator's daughter Dame Sarah Caroline James should by deed or will appoint. By an indenture dated June 9, 1881, to which the trustees of that will and Dame S. C. James were parties a portion of the Shipcote Estate, afterwards known as No. 223 Coatsworth Road Gateshead, was conveyed to Robert Fraser his heirs and assigns. By that deed, Mr. Fraser for himself his heirs executors administrators and assigns covenanted with the trustees their heirs and assigns that he the said Robert Fraser his heirs and assigns would erect and at all times thereafter maintain on the piece of

ground conveyed by the said indenture messuages or dwelling houses with suitable conveniences in accordance with plans elevations and specifications to be provided by the said Robert Fraser his heirs and assigns and approved by Dame S. C. James her heirs and assigns And would at all times thereafter use the said messuages or dwelling houses and permit the same to be used only as and for dwelling houses for not more than one family and would not at any time thereafter use or permit to be used any part of the same premises as or for a shop or manufactory or for the sale of wine ale beer or any excisable liquor under certain penalties therein specified.

By an indenture dated July 25, 1884, the trustees of the will conveyed to Dame S. C. James all the real estate then remaining unsold and vested in them by virtue of the residuary devise in the will. And then, by her will in 1889, Dame S. C. James (who had in the meantime become the Baroness Northbourne and who died in January, 1890) devised her residuary real estate, which comprised such portions of the Shipcote Estate as had not been previously sold, to her husband (the first Baron Northbourne) and the plaintiff (then the Honourable Walter Henry James) upon trust to pay the rents income and annual proceeds thereof to the first baron for his life and after his death upon trust for the plaintiff and his heirs absolutely: and the testatrix appointed the first baron and the plaintiff executors of her will. The first baron died on February 4, 1893, whereupon the plaintiff succeeded to the title and became absolutely entitled to the then remaining unsold portions of the estate. Mr. Robert Fraser had many years ago, in pursuance of the covenant in the indenture of conveyance of 1881, erected a dwelling house on part of the land conveyed to him by that deed—namely, No. 223 Coatsworth Road—and until recently it had been used as a private dwelling house. The defendants had recently purchased No. 223 Coatsworth Road and it was conveyed to them by an indenture dated June 9, 1920. The purchase was made (as Sargant J. found in his judgment) for the purpose of converting the house into a shop and of

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carrying on there a branch of the defendants' business of a stationer. Prior to the purchase the defendants had notice of the restrictive covenants contained in the indenture of June 9, 1881; indeed, in the month of December, 1919, they had made an application to the plaintiff to release the covenant against using the house for the purposes of a shop, which the plaintiff after consideration refused; but the defendants, after having taken advice, resolved to disregard that refusal, and in or about the month of August, 1920, began to convert the house or part of it into a shop. The plaintiff (whose title to the unsold portions of the Shipcote Estate was not disputed) alleged that the conversion would be detrimental to those unsold portions and that it was objected to by the owners of plots in the neighbourhood to whom portions of the said estate had been sold subject to similar covenants. The plaintiff thereupon commenced the earlier of the two consolidated actions for the enforcement of the covenant in question; and on the hearing of a motion in that action on August 25, 1920, the defendants undertook in effect to keep the matter in statu quo until judgment in that action upon the usual terms as to the plaintiff giving a cross-undertaking in damages. Subsequently, the plaintiff for the purpose of fortifying his position procured the execution of an indenture dated February 2, 1921, whereby Charles Ridley Carr, who was the surviving executor of the will of Henry Byne Carr, the survivor of three trustees and joint covenantees named in the indenture of conveyance of June 9, 1881, assigned to the plaintiff the full benefit of all covenants contained in the conveyances of any part or parts of the Shipcote Estate by the trustees or any of them to purchasers or grantees of such part or parts thereof respectively and entered into with the trustees or any of them by such purchasers or grantees imposing restrictions as to building maintenance and user in respect of the premises comprised therein.

On February 10, 1921, the plaintiff commenced the later of the actions against the defendants, the earlier and later actions being consolidated. The claim was for an injunction

to restrain the defendants from using No. 223 Coatsworth Road as a shop or for any other purpose than that of a dwelling house in breach of the covenants in the indenture of June 9, 1881.

The principal defences were first, that after the execution of the indenture of July 25, 1884, the land for whose benefit the restrictive covenants were imposed became severed from the contractual right under the covenant and that the two rights were not capable of being reunited by the assignment of February 2, 1921; secondly, that the land still belonging to the plaintiff was not land for whose benefit the restrictive covenants were imposed or, at any rate, was not land which would be damaged by the breach of the covenant, and, accordingly, the plaintiff could not enforce the covenant specifically against an assign of the original grantee; and, thirdly, that since the imposition of the covenant the character of the neighbourhood had changed and that there had been releases of similar covenants and acquiescence in breaches and waiver or abandonment of rights under the covenant. The decision of Sargant J. on the third head of defence was in favour of the plaintiff, but does not call for a more particular report.

Tomlin K.C. and *H. E. Wright* for the plaintiff. The covenants taken by the trustees on the sale to Fraser in 1881 were taken with the object of enabling them to deal more advantageously with the lands then retained by them when they should afterwards come to dispose of them: *Renals* v. *Cowlishaw*. (1) The beneficiary, when the remaining lands were conveyed to her by the trustees in 1884, was then entitled not only to a conveyance of those lands, but also to an assignment of the benefit of the restrictive covenants in respect thereof and after that conveyance the trustees thenceforth remained trustees of the benefit of those covenants for the beneficiary to whom the lands had been so conveyed. The effect of the assignment in 1921 of the benefit of those covenants, coupled with the previous

(1) (1878) 9 Ch. D. 125; 11 Ch. D. 866.

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conveyance in 1884, was to reunite as legal rights those equitable rights which the beneficiary possessed under the trusts of the will of Cuthbert Ellison: *Ives* v. *Brown*. (1)

A. Grant K.C. and *G. G. Solomon*, for the defendants. First, when the trustees in 1884 conveyed the unsold portions of the estate to the beneficiary without the benefit of the covenants, there was a final severance of the lands, for the benefit of which the covenants had been imposed, from the contractual right under the covenants. After that conveyance the trustees had parted with the whole of the quasi-dominant tenement; no land remained in the trustees to be protected by the covenants, which then became mere covenants in gross: *Formby* v. *Barker* (2); *London County Council* v. *Allen*. (3) The rights which at the time of the conveyance belonged to the beneficiary being thus severed were not capable of being reunited in the plaintiff by means of the subsequent and recent assignment made in 1921; and secondly, No. 223 Coatsworth Road having passed from the original purchaser to the defendants, the plaintiff is not entitled to enforce the covenants, unless he can show what particular portions of the estate, which were retained, were intended to be benefited by the covenants, or, at least, that a breach of the covenants would at the time the covenants are sought to be enforced, in fact result in damage to the portions of the estate retained by the trustees and now vested in the plaintiff: *Rogers* v. *Hosegood*. (4)

Tomlin K.C. in reply. When once restrictive covenants are imposed for the benefit of the land retained by the covenantees, it never becomes relevant to inquire or to prove which particular portions of the retained land the covenants were intended to protect, or to prove that at the time the covenants are enforced they are in fact beneficial to the retained land. It is sufficient to show that the intention, at the time the covenants were entered into, was to benefit the land retained as a whole.

Cur. adv. vult.

(1) [1919] 2 Ch. 314.
(2) [1903] 2 Ch. 539.
(3) [1914] 3 K. B. 642.
(4) [1900] 2 Ch. 388.

June 14. SARGANT J. delivered the following written judgment. These are consolidated actions to restrain the breach of a restrictive covenant contained in an indenture of conveyance dated June 9, 1881, and made between Walter Charles James the Rev. Henry Byne Carr and John Clayton (the trustees) of the first part Dame Sarah Caroline James of the second part and Robert Fraser of the third part whereby the grantee Robert Fraser for himself his heirs executors administrators and assigns covenanted with the trustees their heirs and assigns. [His Lordship then read the covenant in question and proceeded:] The defendants have recently purchased and had conveyed to them a dwelling house No. 223 Coatsworth Road forming part of the premises comprised in the aforesaid indenture, with notice of the indenture and of the covenants therein contained, and have without any release of the covenants and, indeed, in face of a refusal of the plaintiff to grant any such release, proceeded to make alterations in the structure of the house for the purpose of converting it into a shop, and threatened to complete such alterations and to use the house as a shop accordingly. Their position is that, for various reasons which I will state more precisely a little later, the plaintiff is not entitled to the benefit of the covenant and cannot enforce it against them. [His Lordship then referred to the system of developing the Shipcote Estate from 1860 onward, and proceeded:]

On these successive sales it was always stipulated by the vendor that the houses should be in accordance with plans approved by the vendor and that various restrictive covenants should be entered into as to user which varied to some extent in various parts of the estate, but were aimed in general at preserving the amenities and character of the neighbourhood both for the convenience of the residents in the houses that were from time to time built and for the beneficial development of the portions of the estate that were for the time being unsold. It is obvious that these two results are closely connected, and that while the second object might be the only one in which the vendor on each successive occasion might be

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directly concerned, a considerable indirect effect would ordinarily be produced on the reputation and saleability of the unsold portions of the estate for the time being by the preservation or abandonment of those amenities of the developed portions of the estate which were secured or stipulated for by the various restrictive covenants introduced on the occasion of their being built upon. [His Lordship then stated the conveyance of July 25, 1884, observing that that conveyance did not contain any express assignment to the baroness of the benefit of the restrictive covenants with reference to the sold portions of the estate that had from time to time been entered into by the various purchasers thereof with the trustees. And after stating the will and death of the baroness and the death of the first baron and other subsequent events above set forth, proceeded :]

It is admitted by the defendants that the covenant in question, though expressed as entailing a penalty, is, if enforceable at all, enforceable by way of injunction. And, further, the defendants do not contest the title of the plaintiff to the unsold portion of the Shipcote Estate or the position of Charles Ridley Carr as surviving executor of the survivor of the three joint covenantees. The defences of the defendants are three, which I will endeavour to state as accurately as possible. The first is that after the execution of the indenture of July 25, 1884, the land, for the benefit of which the restrictive covenants were imposed, became severed from the contractual right under the covenant and that the two rights were not capable of being reunited by the assignment of February 2, 1921. The second is that the land still belonging to the plaintiff is not land for the benefit of which the restrictive covenant was imposed, or, at any rate, is not land which would be damaged by the breach of the covenant, and accordingly that the plaintiff cannot enforce the covenant specifically as against an assignee of the original grantee. The third is that there has been, since the imposition of the covenant, such an alteration in the neighbourhood of No. 223 Coatsworth Road, and further

such an active participation by the plaintiff in that alteration, that the plaintiff has lost any right he might otherwise have had to the specific performance of the covenant. Of these three defences the first is obviously one of pure law, while the remaining two are defences of mixed law and fact. I will examine them in the order stated.

Mr. Grant for the defendants put the first of these defences thus: He admitted that if by the indenture of July 25, 1884, the trustees had conveyed to Lady Northbourne not only the unsold portions of the Shipcote Estate, but also the benefit of the restrictive covenants relating to the sold portions, she and those entitled under her would have been in a position to enforce these covenants so far as this defence is concerned. But he maintained that, when once the trustees had conveyed the land to Lady Northbourne without the benefit of the covenants, there was a complete and final severance; that the covenants remained in the trustees as mere covenants in gross unconnected with the protection or benefit of land; that they were incapable of being enforced in equity as against an assign of the covenantor: *Formby* v. *Barker* (1) and *London County Council* v. *Allen* (2), and that this defect could not be cured either by Lady Northbourne or her devisees joining with the trustees in an action, or by any subsequent assignment of the covenants by them or their assigns to Lady Northbourne or her devisees. In my judgment, however, this argument is unduly technical, neglects the substance of the matter and is unsustainable. It is of course clear that these restrictive covenants were entered into for the benefit, not of the trustees, but of Lady Northbourne, and that they were as much trustees for her of the benefit of these covenants as of the beneficial interests in the unsold portions of the estate. If, before the execution of the conveyance of July 25, 1884, they had capriciously refused to enforce the covenants, she would have been entitled to compel them to allow her to use their names in an action for the purpose on proper terms. And she could, undoubtedly, had the question arisen, have insisted on the

(1) [1903] 2 Ch. 539. (2) [1914] 3 K. B. 642.

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inclusion in the conveyance to her of an express assignment of the benefit of these covenants. The circumstance that by the conveyance Lady Northbourne became the legal owner of the unsold land could not destroy her existing equitable right to have the restrictive covenants enforced for the protection of that very land. And a subsequent assignment by the trustees or their successors in title to Lady Northbourne or her devisees would merely restore matters to the position in which Lady Northbourne was throughout entitled to have them placed, and reunite, as legal rights, those equitable rights that were subsisting together originally. The case differs widely from either of the two reported cases last referred to—*Formby* v. *Barker* (1), and *London County Council* v. *Allen* (2)—and appears to me to be completely covered by the reasoning in the judgment of Hall V.-C. in *Renals* v. *Cowlishaw* (3) and in my own recent decision in *Ives* v. *Brown* (4), a case which has many points of similarity to the present one.

The second defence, if well founded, would entirely or almost entirely destroy at a very early date the enforceability of the restrictive covenants on any considerable building estate that was being developed on the freehold system. When once a building plot or house had passed from the hands of the original purchasers to those of a third party, it would be incumbent on the owner of the estate to show, as a condition precedent to the enforcement of the covenant, first, that he had intended the covenant to be for the benefit of such portions of the estate as he still retained, and secondly, that it was in fact for their benefit at the time when enforcement was sought. In the case of a building estate of any size it would be impossible to define and point out precisely those portions of it which the owner was seeking to protect or benefit by the restrictive covenants on any particular plot. To enter on every sale into such a precise arrangement as in *Rogers* v. *Hosegood* (5) would be impracticable and absurd,

(1) [1903] 2 Ch. 539.
(2) [1914] 3 K. B. 642.
(3) 9 Ch. D. 125; 11 Ch. D. 866.
(4) [1919] 2 Ch. 314.
(5) [1900] 2 Ch. 388.

and, indeed, would not produce the result required. The practical and usual course is for the vendor to impose covenants the benefit of which will not be attached to any particular parcel of land, but will be enforceable by the vendor for the general benefit of his unsold estate for the time being. Nor do I think that the vendor must on each occasion of enforcement show that the result will in fact be to benefit his remaining estate. Benefit or detriment is often a question of opinion on which there may be the greatest divergence of view, and the greatest difficulty in arriving at a clear conclusion. It is, in my judgment, sufficient for the vendor to say, at any rate in the first instance, that the bargain was that he should be protected against certain acts which were recognized as being likely to prove noxious or detrimental to his building estate treated as a whole. The covenantor, being then, in my judgment, bound at the very least to show that the estate remaining to the covenantee at the date of the action was not intended to be protected by the covenants, or that the breach of the covenants could not possibly hurt such remaining estate, the question arises whether this onus has been discharged in the present case. In my judgment not only have the defendants failed to do so, but the evidence points the other way. It seems to me that the covenants now in question, together with the other restrictive covenants on other portions of the estate, were imposed to preserve the general character and amenities of the whole estate as a building estate, including the very considerable portions thereof which still remain unsold. And, further, the non-enforcement to-day of these restrictive covenants on this house and the other houses already built—for it is clear that they must all stand on the same footing in this respect—would, in my judgment, seriously prejudice the reputation of the estate and the development and sale of the unsold portions of the estate. Colonel Spain, the agent for the estate, was emphatic on this point and the expert witnesses for the defendants, Messrs. Johnston and Taylor, declined to express an opinion to the contrary.

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[His Lordship then dealt with the last defence—namely, that there had been such an alteration in the neighbourhood of No. 223 Coatsworth Road and such a participation by the plaintiff in that alteration as to render it inequitable to insist on the enforcement of the covenant; and decided that that defence also failed. An injunction was accordingly granted as asked by the statement of claim.]

H. C. H.

The defendants appealed, and the appeal was heard on November 10, 11, 14, 15, 1921.

At the conclusion of the arguments judgment was reserved.

The Court was subsequently informed that the parties had come to an agreement of compromise which rendered it unnecessary that judgment should be pronounced upon the appeal.

Solicitors: *King, Wigg & Brightman, for Clayton & Gibson, Newcastle-on-Tyne; Charles Rogers, for Criddle, Ord & Muckle, Gateshead.*

G. A. S.

ASTBURY J.
1922
May 4, 11, 12.

In re USSHER.

FOSTER *v.* USSHER.

[1921. U. 847.]

Will—Vesting—Residuary Estate—Gift of Entirety to Beneficiary on attaining Twenty-five—Trust to apply intermediate Income in Maintenance—"Whole or such part" as Trustees think fit.

A testatrix devised and bequeathed her residuary real and personal estate to her trustees upon trust to convey and transfer the same to U. "when and so soon as he shall attain the age of 25 years." She then directed her trustees to apply "the whole or such part as they may in their absolute discretion think fit" of the income for the "maintenance education or benefit" of the person "presumptively entitled" to her residuary estate, and "during the suspense of absolute vesting" to accumulate the surplus income (if any) in augmentation of her residuary estate, with power to resort to accumulations as income in any subsequent year for the purpose aforesaid:—

Held, following *Fox* v. *Fox* (1875) L. R. 19 Eq. 286, 290 and *In re Williams* [1907] 1 Ch. 180, 183 which in a Court of first instance are binding authorities, that U. took a vested interest at the testatrix's death, and on attaining twenty-one was entitled to an immediate conveyance and transfer.

ORIGINATING SUMMONS.

By her will dated May 12, 1909, the testatrix after appointing the plaintiffs executors and trustees and bequeathing certain legacies devised and bequeathed (clause 3) all the rest and residue of her real and personal estate thereinafter called "my residuary trust estate" unto the trustees "upon trust to convey and transfer the same unto and to the use of [the defendant Ussher] when and so soon as he shall attain the age of 25 years."

By clause 4 the testatrix provided that "my trustees shall apply the whole or such part as they may in their absolute discretion think fit" of the income of her residuary trust estate for or towards the "maintenance education or benefit" of the person for the time being "presumptively entitled to my residuary trust estate" and might either themselves so apply the same or might pay the same to the guardian of that person for the purpose aforesaid without seeing to

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the application thereof. And should "during the suspense of absolute vesting" accumulate the surplus income (if any) in augmentation of her residuary trust estate, but with power to apply any such accumulations in any subsequent year for or towards the "maintenance education or benefit" of the person for the time being "presumptively entitled as aforesaid" in the manner in which those accumulations might have been applied had they been income arising from the original fund in the then current year.

By clause 5 the testatrix provided that "during the minority of the person presumptively entitled as aforesaid" her trustees might manage and receive the rents and profits of her real estate, with the full powers of leasing and management therein mentioned.

The testatrix died on May 14, 1909. The defendant Ussher, who was born on December 26, 1899, was then under ten years old. The residuary estate when cleared was worth about 70,000*l.* and the income between 2000*l.* and 3000*l.* a year. The trustees had continually paid substantial sums out of income for the defendant Ussher's maintenance, education, and benefit, and were still making him a substantial allowance.

On December 26, 1920, the defendant Ussher attained his majority, and on June 14, 1921, after taking legal advice he called for a conveyance and transfer of the estate.

On August 14, 1921, the trustees issued this summons against the defendant Ussher to determine whether being under twenty-five years old he was entitled to an immediate conveyance and transfer.

On February 1, 1922, the heir at law and one of the next of kin were added as defendants.

McMullan for the trustees.

Micklem K.C. and *J. G. Wood* for the defendant Ussher. The whole residue is given to the defendant Ussher at twenty-five. In the meantime he takes a protected life interest in the income, the unapplied surplus of which is to be accumulated for his ultimate benefit, with power to resort thereto

if necessary. That is clearly a vested interest: *In re Williams.* (1)

In a gift of residue or of a severed legacy the Court leans to vesting: *Booth* v. *Booth* (2); *Saunders* v. *Vautier* (3); secus, if the legacy is unsevered: *In re Lord Nunburnholme.* (4)

A gift of the whole intermediate income vests the property: *Hanson* v. *Graham* (5); *Jones* v. *Mackilwain* (6); even though that whole income is only given for maintenance: *In re Hart's Trusts* (7); *In re Bunn* (8); *In re Gossling.* (9)

The only question is whether the whole income, sooner or later, is given to the legatee. If it is, the legacy vests. If, on the other hand, the surplus income not required for the legatee's maintenance is given to some one else, there is no vesting.

That of course is a matter of construction of each particular will, but the rational view is that in the case of residue or a severed legacy, a trust simpliciter to apply the whole or such part of the intermediate income as the trustees think fit in maintenance is prima facie a gift of the whole income, sooner or later, to the legatee and therefore vests the legacy: *Harrison* v. *Grimwood* (10); *Fox* v. *Fox* (11); *In re Parker* (12); *In re Williams* (1); *In re Turney* (13); *In re Hume* (14); *In re Woolf.* (15)

In *Fox* v. *Fox* (11) maintenance was given out of the presumptive aliquot share of each member of a class, so that the same rule was applicable as in the case of individuals. If however the whole income is given for the maintenance of a whole presumptive class en masse the persons who attained a given age might well be different from those maintained, and there would be no vesting: *In re Grimshaw's Trusts* (16) in which *Fox* v. *Fox* (11) was recognized, but distinguished.

(1) [1907] 1 Ch. 180, 183.
(2) (1799) 4 Ves. 399, 407.
(3) (1841) Cr. & Ph. 240.
(4) [1912] 1 Ch. 489.
(5) (1801) 6 Ves. 239, 249; Tudor's L. C. on Real Property, 4th ed., pp. 440, 448.
(6) (1826) 1 Russ. 220.
(7) (1858) 3 De G. & J. 195.
(8) (1880) 16 Ch. D. 47.
(9) [1903] 1 Ch. 448, 451.
(10) (1849) 12 Beav. 192.
(11) L. R. 19 Eq. 286, 290.
(12) (1880) 16 Ch. D. 44, 45, 46.
(13) [1899] 2 Ch. 739, 747.
(14) [1912] 1 Ch. 693, 699.
(15) [1920] 1 Ch. 184, 189.
(16) (1879) 11 Ch. D. 406.

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In *Dewar* v. *Brooke* (1) and *In re Wintle* (2) there was only a discretionary power of maintenance. Unlike a trust, that was in no sense a gift, and the criticisms on *Fox* v. *Fox* (3) were merely obiter.

Luxmoore K.C. and *C. A. Bennett* for the heir at law. The initial gift is admittedly contingent, and is so treated throughout the whole of clause 4, though possibly the expression " absolute vesting " may refer to vesting in possession.

A contingent legacy can only be vested by a trust to apply the " whole " intermediate income for the legatee : *Hanson* v. *Graham* (4) ; *Watson* v. *Hayes* (5); *In re Sanderson's Trust* (6) ; *Hardcastle* v. *Hardcastle.* (7) In the present case the trust is expressly limited to the whole or a discretionary part.

The actual decision in *Fox* v. *Fox* (3) was justified by the gift over, and that was really the only ground of its approval in *In re Turney* (8) where the maintenance clause was considered of little importance. But the rule laid down in *Fox* v. *Fox* (3) to the effect that a trust to apply the whole or part of the income is tantamount to a gift of the whole income, so as to vest a contingent legacy, has been often disapproved, e.g., in *In re Grimshaw's Trusts* (9) ; *Dewar* v. *Brooke* (1); and *In re Wintle.* (2)

It is true that the last two cases related to powers of maintenance, but in this respect a power is equivalent to a trust. The Court must not misconstrue a will in order to avoid an intestacy.

Sheldon and *Gavin Simonds* for the next of kin adopted the same argument.

ASTBURY J. [after stating the facts]. It is very difficult to ascertain the testatrix's real intention from reading the language in her will, because instead of making special provision for the maintenance of the defendant Ussher the

(1) (1880) 14 Ch. D. 529.
(2) [1896] 2 Ch. 711.
(3) L. R. 19 Eq. 286, 290.
(4) 6 Ves. 239, 249 ; Tudor's L. C. on Real Property, 4th ed., pp. 440, 448.
(5) (1839) 5 My. & Cr. 125, 133.
(6) (1857) 3 K. & J. 497.
(7) (1862) 1 H. & M. 405, 410.
(8) [1899] 2 Ch. 739, 747.
(9) (1879) 11 Ch. D. 406.

draftsman has used haphazard a common form maintenance clause providing for the maintenance of the person "presumptively entitled" to the residuary trust estate. A clause adopted under those circumstances does not throw very much light on the testatrix's actual intention.

The question whether this prima facie contingent gift has become a vested gift by reason of the provisions of clause 4 depends to a large extent upon authorities which are far from consistent. Before turning to those authorities I may say that the defendant Ussher contends that on the true construction of this will, read as a whole, the testatrix must have intended to give him a present vested interest in her residuary estate with a superimposed direction that he should not be put into possession of it until attaining the age of twenty-five. That is based partly upon the fact that the trust is "to convey and transfer" the residuary estate to him at twenty-five and partly upon the fact that there is a trust that the trustees shall apply the whole of the income in the meantime for the person for the time being "presumptively entitled" to that residuary estate—who can only be the defendant Ussher if the first suggestion is accurate—with a discretionary power to apply less if they shall think fit. He contends that in substance this is a provision that he shall come into possession at twenty-five with a right to enjoy the income in the meantime; and that as it is a gift of residue, and there is no gift over, the intention is clearly to vest this property in him as from the testatrix's death.

If the trust had been to apply "the whole" of the income for or towards the maintenance, education, or benefit of the defendant Ussher until he attained twenty-five this point would be free from doubt.

In *Hanson* v. *Graham* (1) there was a gift which in itself would have been contingent, followed by a gift of the income until what otherwise would have been the vesting period occurred. Grant M.R. said: "In this cause therefore I should have determined against the plaintiffs; if it stood merely upon the first words. But then it is contended, that

(1) 6 Ves. 239, 249; Tudor's L. C. on Real Property, 4th ed., pp. 440, 448.

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they are entitled; because interest is given; and that they come within an established rule of the Court; that though such words are used as would not have vested the legacy, yet the circumstance of giving interest is an indication of intention, explanatory; and denoting, that the testator meant the whole legacy to belong to the legatee. On the other side it was contended, that the interest is not so given as to bring it within the general rule, but what is given is more like maintenance. It is true, it has been held, that has not the same effect as giving interest; upon this principle; that nothing more than a maintenance can be called for: what can be shown to be necessary for maintenance: however large the interest may be; and therefore what is not taken out of the fund for maintenance must follow the fate of the principal; whatever that may be. But by this will it is clear, the whole interest is given. Can there be any doubt, that in this case all the interest became, as it fell due, the absolute property of these infants, as separated altogether from the residue? All, that is left to the trustees, is to determine, in what manner it may be best employed. It is not merely so much of the interest as shall be necessary for the maintenance, but the interest entirely, separated from the principal."

That case has been followed over and over again, and the rule now is beyond question that a gift that would otherwise be contingent, followed by a gift of the "whole income" to or for the benefit of the person in question will vest what would otherwise have been only a contingent gift. That is so in regard to ordinary legacies, and of course it is so a fortiori in the case of a gift of residue.

In *Watson* v. *Hayes* (1) it was again explained that the ratio of this rule was a gift of "the whole" of the interest. In *In re Sanderson's Trust* (2) it was pointed out that a provision to apply "the whole or any part" of the income in the meantime did not necessarily mean "the whole" income, and therefore bring the case within the rule. Again in *Hardcastle* v. *Hardcastle* (3) Wood V.-C. said that if only a sufficient

(1) 5 My. & Cr. 125, 133. (2) 3 K. & J. 497. (3) 1 H. & M. 405, 410.

portion for maintenance of the intermediate income is given, it is conclusive against vesting.

The argument against the defendant Ussher is that on the true construction of this gift, taken as a whole, he is only to obtain his rights in the capital if and when he attains twenty-five, and that in the meantime there is no necessary gift to him of "the whole" of the income, but a discretionary trust in the trustees to give him "the whole or such part as they shall think fit." But in dealing with residue it is important to bear in mind that the testatrix prima facie did not intend to die intestate, and that any reasonable grounds for holding that a residuary gift is vested in order to avoid a possible intestacy may and ought to be regarded.

I do not intend to go through the large number of authorities which have been cited to me as to the various expressions which have been held by the Courts to show an intention that "the whole" of the intermediate income should belong to the legatee in any event. I will only deal with a few cases in which the effect of a discretionary trust or power in the trustees to apply "the whole or such part as they think fit" of the intermediate income has been discussed.

The principal authority in favour of vesting in such a case is *Fox* v. *Fox*. (1) This case has given rise to a very considerable amount of discussion and difference of opinion among various judges. "A testator directed his trustees to raise a sum of 15,000*l*., and after the determination of certain prior life interests given to T. and his widow to divide and transfer one-fifth of the fund to and amongst the children of T. equally as and when they should respectively attain the age of twenty-five years, applying from time to time the income of the presumptive share of each child, or so much thereof as the trustees for the time being might think fit, for his and her maintenance and education until such share should become payable as aforesaid" with a gift over if no child attained twenty-five. Jessel M.R. held that the children took vested interests at the testator's death, and consequently that the gift was not void for remoteness.

(1) L. R. 19 Eq. 286, 290.

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After commenting on *In re Ashmore's Trusts* (1) and *Pulsford* v. *Hunter* (2) Jessel M.R. referred to *Watson* v. *Hayes* (3) where Lord Cottenham laid stress upon the fact that in order to vest an otherwise contingent legacy the "whole" of the interest in the meantime must be given; and after referring to *Hanson* v. *Graham* (4) and commenting on other cases Jessel M.R. said: "There still remains the difficulty that the gift here is not a gift of the whole income absolutely for maintenance: there is a discretionary power to apply the whole income, or so much as the trustees may think proper, and the question is, whether that is a gift of the whole interest within the rule as laid down in *Watson* v. *Hayes* (3) and the other cases I have referred to. On that point *Harrison* v. *Grimwood* (5) is a distinct authority. There the legacy was given to a class, followed by a direction, during the minority of the members of the class, to apply the interest, 'or a competent portion thereof,' for maintenance; and the Court held the legacy was vested. Lord Langdale does not appear to have considered the indication of intention derived from the direction to pay the whole income as affected by the words enabling the trustees to apply a competent portion for maintenance; he treated it as a gift of the whole income followed by a discretion to apply less than the whole income; and that appears to me to be a rational view. Being opposed to the frittering away of general rules, and thinking that such rules, so long as they remain rules, ought to be followed, I hold that a gift contained in a direction to pay and divide amongst a class at a specific age, followed by a direction to apply the whole income for maintenance in the meantime, is vested,"—That of course is clearly a view in accordance with a long line of authority, but he adds: "and not the less so because there is a discretion conferred on the trustees to apply less than the whole income for that purpose."

In that case there was a gift over, and Jessel M.R. stated

(1) (1869) L. R. 9 Eq. 99.
(2) (1792) 3 Bro. C. C. 416.
(3) 5 My. & Cr. 125, 133.
(4) 6 Ves. 239.
(5) 12 Beav. 192.

that he thought that the gift over, if not conclusive on the question, certainly aided the construction which he adopted. There is really no substantial distinction as far as the application of the intermediate income is concerned between that case and the present. There was a direction to apply (which is equivalent to a trust) the whole of the income or so much as the trustees for the time should think fit.

In *In re Williams* (1), where there was no gift over, Neville J. came to a similar conclusion. "A testator gave all his residuary estate to trustees upon trust as to one-third part thereof to pay the income, or such part thereof as his trustees should think fit, to his son W. for his advancement, preferment, or benefit by equal weekly instalments until he should attain thirty-five, and then to pay him the corpus." It was held that he took a vested interest at the testator's death. Neville J. said: "It is said, and I think quite accurately, that the rule is absolute that where a legacy is given at a future date accompanied by a gift of income in the meantime, the legacy vests in the legatee at once, notwithstanding the fact that he does not live until the date fixed for payment. Moreover, I think I may go one step further and say that if the whole of the income of such a legacy be given for maintenance until the time fixed for payment, that is treated as a gift of income and the legacy is vested. There is a third form of gift which is open to some doubt, and which seems to be very near the form in the present case, viz., a gift of a legacy at a future date accompanied by a gift for maintenance in the meantime of the whole or such part of the income as the trustees think fit. Many cases have been cited to me, but I do not intend to go into them in detail; I will simply state the view to which I have come. On the authorities I think the question really is whether Sir George Jessel M.R. was justified in the statement of the rule made by him in *In re Parker*. (2)"—That is a case in which Jessel M.R. restated the rule he had laid down in *Fox* v. *Fox*. (3)—"He said there: 'When a legacy is payable at a certain age, but

(1) [1907] 1 Ch. 180, 183. (2) 16 Ch. D. 44, 45, 46.
(3) L. R. 19 Eq. 286, 290.

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is, in terms, contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given; and not the less so when there is superadded a direction that the trustees shall pay the whole or such part of the interest as they shall think fit.'" Neville J. then referred in terms to *Fox* v. *Fox* (1), and to *In re Wintle* (2), in which North J. disapproved of *Fox* v. *Fox* (1), and to *In re Turney* (3), where Lindley M.R. and Jeune P. in the Court of Appeal thought *Fox* v. *Fox* (1) was sound. On the construction of the will before him Neville J. came to the conclusion that the testator intended his son to have the whole of the income as well as the capital. That is a little difficult to follow unless Neville J. meant that primarily the trustees were to pay the whole of the income to the son with some discretion to pay less if events warranting the exercise of that discretion should arise.

I do not propose to go through the facts in *In re Wintle* (2) or in *In re Turney.* (3) I am not at all sure that there is any conflict between the actual decisions in *In re Wintle* (2) and *Fox* v. *Fox* (1), the gifts in each case being wholly different. It is true that North J. expressed disapproval of *Fox* v. *Fox* (1), and that two members of the Court of Appeal in *In re Turney* (3) expressed decided approval of it. It is equally true that the main ground on which *In re Turney* (3) turned was the gift over, which was in similar terms to that in *Fox* v. *Fox* (1), rather than the provision as to the payment of the intermediate income to which Lindley M.R. did not "attach very much importance." (3)

In *In re Hume* (4) Parker J. states the rule as to the effect on vesting of these intermediate gifts of income; and with regard to *Fox* v. *Fox* (1) he appears to have been a little lukewarm. He says: "It is possible also that a direction to apply the intermediate income or such part thereof as the trustees may think proper for the maintenance or benefit of the beneficiary will have the same effect"—i.e., as a gift of the whole.

(1) L. R. 19 Eq. 286, 290.
(2) [1896] 2 Ch. 711.
(3) [1899] 2 Ch. 739, 747.
(4) [1912] 1 Ch. 693, 699.

In *In re Woolf* (1) Sargant J. referred to *Fox* v. *Fox* (2) and *In re Williams* (3) in these terms: "Such cases as for instance *Fox* v. *Fox* (2) establish that, where there exists an ambiguity in the frame of the bequest, as to whether the legacy is intended to vest immediately or on a contingency, the question of construction may be settled by a direction in the will to apply the whole or any part of the income in the meantime for the benefit of the legatee. That is a mere rule in aid of construction as to vesting of capital. *In re Williams* (3) is a case of the same kind."

The result, therefore, is that as far as this Court is concerned, *Fox* v. *Fox* (2) and *In re Williams* (3) are clear decisions to the effect that in cases of this kind a trust to apply the whole or such part as the trustees shall think fit of the intermediate income in favour of the legatee is sufficient to vest what would otherwise be a contingent gift. Those cases have been approved of and disapproved of, at least as far as *Fox* v. *Fox* (2) is concerned, but they have never been overruled; and as far as I am concerned I think it is my duty to follow them without expressing any further opinion of my own upon them.

The language of clause 4, having regard to the fact that the gift is a gift of residue, is not I think sufficient to displace the effect of the above vesting rule; and in view of these two decisions I feel bound to hold on the true construction of the will, that the gift was a vested gift as from the date of the testatrix's death.

As the next of kin are very numerous I will make a representation order. Solicitor and client costs of all parties out of the estate.

Solicitors: *Lumley & Lumley; Vardon & Corfield; Blachford, Norton & Smith; Lowe & Co.*

(1) [1920] 1 Ch. 184, 189. (2) L. R. 19 Eq. 286, 290.
(3) [1907] 1 Ch. 180, 183.

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May 5.

W. H. DORMAN AND COMPANY, LIMITED *v.* HENRY MEADOWS, LIMITED.

[1922. W. 1167.]

Trade Name—Surname attached to Engine—Rival Company—Rival Engine—Designer with same Surname—Use of Designer's Name—Probability of Confusion—Passing off—Form of Injunction.

The name "Dorman" as applied to motor engines had become entirely associated with engines made by the plaintiff company, to many of which the defendant company's "Meadows Gear Box" had been attached.

The plaintiff company's sales manager, an engineer named J. E. Dorman, had recently left the plaintiff company and become a director and sales manager of the defendant company, for whom he designed a motor engine to which the Meadows Gear Box was to be attached. At his suggestion this was put on the market as the "Meadows-Dorman" engine so as to show the designer's as well as the maker's name.

The plaintiff company thereupon claimed an absolute injunction to restrain the defendant company from using the name "Dorman" in any shape or form in connection with motor engines.

The defendant company, while not opposing an absolute injunction as to the form "Meadows-Dorman" which had in fact led to confusion, contended that it was entitled to state the engine-designer's name, with proper safeguards to avoid confusion, and therefore only a limited injunction ought to be granted:—

Held, that the defendant company must be restrained:—

First from using the form "Meadows-Dorman" at all in connection with its engines;

Secondly from using the name "Dorman" in connection with its engines without taking all proper precautions clearly to distinguish the defendant company's business and goods from those of the plaintiff company.

Thirdly from so using or referring to the name "Dorman" as to lead purchasers or others to suppose that the defendant company's goods were those of the plaintiff company, or that there had been any amalgamation or agreement between the two companies as to their manufacture or sale.

J. & J. Cash, Ld. v. *Cash* [1902] W. N. 32; 19 R. P. C. 181, 186; *Fine Cotton Spinners and Doublers' Association and John Cash & Sons* v. *Harwood Cash & Co.* [1907] 2 Ch. 184; and *Kingston, Miller & Co.* v. *Thomas Kingston & Co.* [1912] 1 Ch. 575 considered and applied.

MOTION.

The plaintiff company was incorporated in 1897 as a private company to carry on (inter alia) the business of engineers and to purchase the business of W. H. Dorman &

Co., Stafford. W. H. Dorman, who originally founded the business about 1872, was a director till his retirement in 1911. His son, J. E. Dorman, after eleven years' experience as a practical engineer in America, was a director from November, 1898, until December, 1916, when he retired from the board, and agreed to act as sales manager and advertising and catalogue composer for five years expiring July 31, 1921.

In August, 1917, the plaintiff company was turned into a public company, and in 1919 its capital was increased to 700,000*l.*

Before 1911 and continuously since that year the plaintiff company's business had largely consisted of the manufacture and sale of internal-combustion engines chiefly for motors, and as sales manager it was J. E. Dorman's special duty to visit customers and negotiate contracts for these engines, which were advertised and sold as "Dorman Engines." Under this name the sales had been very extensive and the plaintiff company had obtained a great reputation for their engines, which they had spent large sums in advertising, with the result that in the minds of the purchasers, dealers, and members of the public the name "Dorman" in connection with engines admittedly denoted engines of the plaintiff company's manufacture.

On April 4, 1919, the defendant company was incorporated with a capital of 10,000*l.* increased to 50,000*l.* in the November following. Its works were at Wolverhampton, where it manufactured and sold gear boxes for use with combustion engines. These were called "The Meadows Gear Box." At the plaintiff company's suggestion their customers had frequently attached a Meadows Gear Box to a Dorman engine.

On July 31, 1921, J. E. Dorman left the plaintiff company's employment and in September, 1921, he became a director and sales manager of the defendant company, for whom he designed an engine to which the Meadows Gear Box was to be attached. At his suggestion this engine was to be put on the market as "The Meadows-Dorman Engine" so as

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to show the designer's as well as the maker's name and in the Light Car of March 25, 1922, it was so advertised.

On March 28 the plaintiff company being apprehensive that the use of the name "Dorman" in connection with the defendant company's engines would lead to confusion commenced an action for an injunction and damages, and on March 31 the plaintiff company served a notice of motion for an injunction to restrain the defendant company, its servants and agents, until the trial from using or permitting or suffering to be used the name "Dorman" upon or in connection with or as the description or as part of the description of the defendant company's motor engines or any parts thereof; and from advertising, offering for sale, or selling its motor engines or any parts thereof described or marked with the name "Dorman" as all or part of the description thereof and from otherwise leading, inducing, or permitting prospective customers or others to believe or suppose that the defendant company's goods were those of the plaintiff company.

The plaintiff company put in trade evidence to prove that the use of the name Dorman would certainly lead to confusion, and as an instance of actual confusion a letter of April 20 from the Coventry Motor Fittings, Ld., to the plaintiff company was produced, in which the Coventry company stated that they were making a radiator to go with "one of your Meadows-Dorman engines" and asking information as to the mode of attachment. Owing to the very recent appearance of the defendant company's advertisements no other instance of actual confusion was available, and the action was mainly quia timet.

The defendant company on the other hand, while admitting that the expression "Dorman Engine" denoted the plaintiff company's engine, put in evidence by J. E. Dorman and other trade witnesses to show that in their opinion there could be no possible confusion between a "Dorman Engine" made by W. H. Dorman & Co., Ld., of Stafford, and a "Meadows-Dorman Engine" made by Henry Meadows, Ld., of Wolverhampton, particularly as the words "Stafford"

and "Wolverhampton" appeared on the name-plates of the respective engines. They also said that J. E. Dorman was an engineer and draughtsman of considerable experience and reputation and that his name was well known as such in the motor industry. There was a conflict of evidence on the question whether his statement that he had actually designed engines for the plaintiff company was accurate, but the Court thought that point immaterial.

By consent the motion was treated as the trial of the action.

Micklem K.C. and *Cecil Caporn* for the plaintiff company. The defendant company has no right whatever in the name Dorman. The plaintiff company is entitled to an absolute injunction to restrain the use of that name in connection with the defendant company's engines: *Fine Cotton Spinners and Doublers' Association and John Cash & Sons* v. *Harwood Cash & Co.* (1); *Kingston, Miller & Co.* v. *Thomas Kingston & Co.* (2); *Guimaraens & Son* v. *Fonseca & Vasconcellos, Ld.* (3)

Sir Arthur Colefax K.C. and *Moritz* for the defendant company. The defendant company has not incorporated the name "Dorman" into its corporate name, as in the above three cases, nor is there any case of fraudulent passing off or infringement of a registered trade mark as in the last case. This is a simple passing off action based on the probability of confusion.

Now the defendant company's engine is designed by J. E. Dorman, a practical engineer of considerable experience and reputation. The defendant company is entitled to state the designer's name, if it takes proper precautions to avoid any confusion between its own engines and those of the plaintiff company. Having a great belief in the superiority of its own engines, it was only too anxious to avoid any such confusion, and thought it had done so by the use of the form "Meadows-Dorman." The Meadows gear had however been so frequently attached to a "Dorman" engine as to render

(1) [1907] 2 Ch. 184.
(2) [1912] 1 Ch. 575.
(3) [1921] Current Digest 377; 38 R. P. C. 388.

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this form misleading, and the defendant company does not oppose an absolute injunction as to the use of the name "Dorman" in the form "Meadows-Dorman."

But further than that it cannot go. It cannot and does not wish to use the name Dorman as part of its title, but it does wish to state the designer's name on its engines. An absolute injunction would prevent that. The injunction should therefore be limited to restraining the defendant company from using the name "Dorman" in connection with its engines without sufficiently distinguishing them from those of the plaintiff company: *J. & J. Cash, Ld.* v. *Cash.* (1)

[ASTBURY J. In that case the defendant was using his own name. Here the defendant company has no right to the name at all.]

It surely has a right to state who designed its engines as long as it avoids confusion. For instance, it could say, "H. Meadows, Ld., Wolverhampton, Manufacturer. J. E. Dorman, Designer," and add, if the plaintiff company wished it, "Neither the manufacturer nor the designer has any connection with W. H. Dorman & Co., Ld., of Stafford."

It must be remembered that J. E. Dorman is not a manufacturer. He makes his living by designing engines for other people, and his name only appears in connection with those engines. If none of his employers may mention their designer's name he is practically deprived of the use of his own name and reputation, in the only way he can effectively use them.

ASTBURY J. [after stating the facts]. In my opinion on the evidence there is not the slightest justification for the defendant company describing its engine as the Meadows-Dorman engine. The defendant company's business is not the business of J. E. Dorman. The name "Dorman" is not part of its title, and J. E. Dorman did not carry on or assign to the defendant company any business previously carried on by him.

There is evidence that the form "Meadows-Dorman" will

(1) [1902] W. N. 32; 19 R. P. C. 181, 186.

lead to confusion of many kinds, or is likely to do so. The action having been started promptly, there has naturally been little time for confusion to accumulate, but I have before me a letter from a perfectly independent firm written on April 20 last to the plaintiff company referring to a radiator that they were making "for one of your Meadows-Dorman engines."

The defendant company admits that the "Dorman" engine means an engine manufactured by the plaintiff company, and it seems to me plain that confusion may occur in many different ways if the defendant company is allowed to continue the use of this description "Meadows-Dorman." Some people might think that the Meadows-Dorman engine was an engine manufactured by the plaintiff company with certain Meadows attachments; others might think that the defendant company had obtained the plaintiff company's licence to manufacture a composite article including the Dorman engine; others might think that the Meadows-Dorman engine was made by a subsidiary company for the plaintiff and the defendant companies; while other people might assume, perfectly reasonably, that there had been an amalgamation qua this engine between the plaintiff and the defendant companies.

That confusion will probably arise I think is perfectly plain. It is equally plain, in my judgment, that the defendant company has made use of this form knowing of the plaintiff company's reputation, and desiring to compete with that company, and that it has no right or justification in law for doing anything of the kind.

The only question therefore is what form of injunction ought to be granted. On the authorities I think the plaintiff company would probably be entitled to an absolute injunction preventing the use of the word "Dorman" in connection with these engines at all.

In *Fine Cotton Spinners and Doublers' Association and John Cash & Sons* v. *Harwood Cash & Co.* (1), where the defendant company was a company registered by one

(1) [1907] 2 Ch. 184.

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John Harwood Cash, and where the successors of the well-known firm of John Cash & Sons were plaintiffs, Joyce J. held that: "Although, in the absence of fraud or false representation, a man is entitled to carry on business in his own name in competition with a similar business, previously well established under the same name, notwithstanding that confusion and mistake may in consequence arise, yet, if he has never carried on such a business on his own account or in partnership with others, he cannot, by promoting and registering a company with a title of which his name forms a part, confer upon that company the rights which he, as an individual, possesses in the use of that name"; and the learned judge explained the principles upon which he arrived at that decision.

That case was followed by Warrington J. in *Kingston, Miller & Co.* v. *Thomas Kingston & Co.* (1), where the principles explained by Joyce J. were fully approved of.

In the present case the defendant company is in no sense a company formed by an individual for the purpose of carrying on business in his name so far as "Dorman" is concerned, but what it is attempting to do is to use the name "Dorman" by reason of its having taken a former employee of the plaintiff company into its employ for the purpose of competing with the plaintiff company.

In an earlier case of *J. & J. Cash, Ld.* v. *Cash* (2), the well-known company J. & J. Cash, Ld., brought an action against Joseph Cash, who was carrying on a competing business under the name of "Joseph Cash & Co.," which he proposed to transfer to a limited company registered by him in May, 1899, as "Joseph Cash, Ld." In the Court below an injunction generally was granted to restrain the defendant (1.) from using the word "Cash" in connection with his business and its products or (2.) making over that business to a limited company with a name including "Cash." In the Court of Appeal the first part of the injunction was limited on the express ground that there was no authority justifying the Court in restraining the man altogether from carrying on a particular

(1) [1912] 1 Ch. 575. (2) [1902] W. N. 32; 19 R. P. C. 181, 186.

business in his own name; and that part of the injunction was limited to restraining the use of the word "Cash," without taking proper precautions to prevent confusion and passing off. The second part of the injunction was unaltered.

Now I can conceive that there might be an innocent reference to J. E. Dorman, carefully safeguarded, which the Court ought not to restrain the defendant company here from making use of, although any reference to the word "Dorman" in connection with an engine manufactured and sold by the defendant company would in my judgment be extremely dangerous.

On the whole I think that the proper order in this case will be a perpetual injunction to restrain the defendant company from using the form "Meadows-Dorman" in connection with its engines or any engine parts that it may manufacture and sell; secondly from using or permitting or suffering to be used the name "Dorman" upon or in connection with or as the description or as part of the description of the defendant company's engines or parts; and from advertising, offering for sale or selling its engines or parts described by or marked with the name "Dorman" as all or part of the description, without taking all proper precautions clearly to distinguish the business carried on and the goods manufactured and sold by the defendant company from the business carried on and the goods manufactured and sold by the plaintiff company; and thirdly, from so using or referring to the name "Dorman" as to lead, induce or permit prospective purchasers or others to believe or suppose that the goods of the defendant company are the plaintiff company's goods, or that there has been any amalgamation or agreement between the two companies as to their manufacture or sale. The defendant company must pay the costs of the action.

Solicitors: *Caporn & Campbell; Maude & Tunnicliffe, for Stirk & Co., Wolverhampton.*

G. R. A.

P. O. LAWRENCE J.

1922

March 21, 28.

In re NORTH WALES PRODUCE AND SUPPLY SOCIETY, LIMITED.

[0052 of 1922.]

Industrial and Provident Society—Bill of Sale—Debenture—Incorporated Company—Severance of Security—Winding Up—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 17.

Upon a claim by a debenture holder in the winding-up of a Society incorporated under the Industrial and Provident Societies Act, 1893, to be declared a secured creditor, the question arose whether the debenture, by which the property of the Society present and future was charged to secure the repayment of the principal sum and interest, was void by reason of the Bills of Sale Acts, as to all or any of the assets of the Society thereby charged:—

Held, (1.) that the Society was not an incorporated company within the exception from the Bills of Sale Act, 1882, mentioned in s. 17 of that Act, and (2.) that the property charged by the debenture, although described in general terms, was severable; and that, accordingly, the debenture was a valid charge upon such of the assets of the Society as did not consist of personal chattels within the definition of s. 4 of the Bills of Sale Act, 1878.

SUMMONS in winding up.

The North Wales Produce and Supply Society, Limited, was on July 31, 1918, incorporated and registered under the provisions of the Industrial and Provident Societies Act, 1893, under a slightly different name (which was shortly afterwards changed), with the main object of carrying on the business of wholesale and retail dealers in agricultural requirements, dairy, farm and garden produce.

The Society was governed by rules under which the business was conducted by a committee, and by r. 12 the committee was empowered to obtain loans, within certain limits not material to be here stated, on such security and such terms as the committee might think fit. On March 27, 1920, the committee, in pursuance of their powers, obtained a loan of 500*l.* from the respondent Alfred Ernest Priddle on the security of a debenture under the common seal of the Society. The sum so borrowed and the security so given were admittedly within the borrowing powers conferred by r. 12.

The debenture was dated March 27, 1920, and the Society

thereby covenanted within six calendar months after notice or on such earlier day as the principal money thereby secured might become payable in accordance with the conditions endorsed thereon to pay to the respondent the sum of 500*l.*, and also in the meantime to pay interest thereon at the rate of 6*l.* per cent. per annum; and the Society as beneficial owner thereby charged with such payments all its property whatsoever and wheresoever both present and future, including its uncalled capital for the time being. By the conditions endorsed on the debenture it was provided (amongst other things) that the debenture should rank as a first charge on the property thereby charged as a floating security, and that the principal money thereby secured should immediately become payable if an effective resolution should be passed for winding up the Society.

On March 26, 1921, the Society passed an effective resolution for winding up and for the appointment of the applicant, Edward Noel Humphreys, as liquidator.

At the date of the winding-up resolution the assets of the Society consisted of (1.) book debts owing to the Society of the value of 662*l.*; (2.) cash and miscellaneous receipts amounting to 65*l.*; (3.) fixtures of the value of 26*l.*; and (4.) personal chattels, consisting of stock, furniture, vehicles, etc., of the value of 279*l.*

From a statement of affairs of the Society, the Society appeared to be insolvent; and a summons was taken out by the liquidator for the determination of the question whether under the said instrument of March 27, 1920, purporting to be a debenture issued by the Society to the respondent to secure an advance of 500*l.* to the Society, the respondent was entitled in the winding up of the Society to rank as a secured creditor with a charge upon the whole of the assets of the Society or upon any, and if any, what part of the said assets.

Swords, for the liquidator. First, the debenture in question, there being no other provision by statute for the registration of such a debenture, is not within the protection of s. 17 of

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the Bills of Sale Act, 1882. That protection extends only to debentures issued by any "mortgage, loan, or other incorporated company." This Society is not an incorporated company within the meaning of that section: *Great Northern Railway Co.* v. *Coal Co-operative Society.* (1) And the judgment of Vaughan Williams J. in that case is treated by Phillimore J. in *Clark* v. *Balm, Hill & Co.* (2) as conclusive on that point. Secondly, the debenture is admittedly void as regards the property comprised in it consisting of "personal chattels." The security is a charge on all the assets of the Society in one mass and is void in toto, because on the face of the instrument itself it is not possible to sever the illegal from the legal part of the security. In *In re Burdett* (3) and in *In re Isaacson* (4) the subject matter charged was so described in the instrument itself as to be severable. The instrument does not comply with s. 9 of the Bills of Sale Act, 1882, and is void on that ground: *Cochrane* v. *Entwistle.* (5)

Hunt, for the respondent, the debenture holder. This is a debenture of "an incorporated company" within the meaning of the excepting section, s. 17 of the Bills of Sale Act, 1882. By s. 5, sub-s. 5, of the Industrial and Provident Societies Act, 1893, the word "limited" is to be the last word in the name of the society registered under that Act; and by s. 21 of the same Act a registered society is rendered a "body corporate" with limited liability. Apart from authority, this Society is an "incorporated company" within the meaning of s. 17. Even although there is no provision for the registration of the mortgages of such a society as this, this Society is, nevertheless, entitled to the protection of s. 17: *Clark* v. *Balm, Hill & Co.* (2); *Read* v. *Joannon.* (6) The decision of Vaughan Williams J. in *Great Northern Railway Co.* v. *Coal Co-operative Society* (1) is, it is submitted, too narrow. Secondly, the charge is valid so far as regards the property which is not within the mischief aimed at by

(1) [1896] 1 Ch. 187.
(2) [1908] 1 K. B. 667, 671.
(3) (1888) 20 Q. B. D. 310.
(4) [1895] 1 Q. B. 333.
(5) (1890) 25 Q. B. D. 116.
(6) (1890) 25 Q. B. D. 300.

the Bills of Sale Acts, and is only void as to the property which is within that mischief. In so far as the debenture charges "personal chattels" it is a bill of sale and void, but it is not a bill of sale at all as a charge on the other property comprised in it: *Mumford* v. *Collier*. (1) The whole of the instrument is not necessarily void, because it embodies a void bill of sale: *In re Burdett*. (2) The principle of that case did not depend upon the question whether the properties charged were severable in the description of them in the instrument itself. If the properties are capable of severance, one may reject that part of the security which is made void by the statute and retain that part which is unaffected. Nothing that was said by the learned judges in *In re Isaacson* (3) was intended to limit the capability of severance to a case where the properties charged were described separately in the instrument itself.

Cur. adv. vult.

March 28. P. O. LAWRENCE J. stated the facts and continued: The Society is insolvent and the liquidator contends that the debenture given to the respondent is altogether void by virtue of the provisions of the Bills of Sale Acts, 1878 and 1882.

In answer to this contention Mr. Hunt, on behalf of the respondent, raises two points—namely, first, that the debenture is outside the purview of the Bills of Sale Act, 1878, and comes within the exception of s. 17 of the Bills of Sale Act, 1882; and secondly, in the alternative, that the debenture creates a valid charge on all the property of the Society as it existed at the date of the winding up other than "personal chattels" as defined by s. 4 of the Bills of Sale Act, 1878.

In my judgment the first point is concluded against the respondent by the case of *Great Northern Railway Co.* v. *Coal Co-operative Society* (4), in which Vaughan Williams J. decided that the defendant society which was registered under the Industrial and Provident Societies Act, 1893, was not a

(1) (1890) 25 Q. B. D. 279, 284.
(2) 20 Q. B. D. 310.
(3) [1895] 1 Q. B. 333.
(4) [1896] 1 Ch. 187.

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company within the meaning of s. 17 of the Bills of Sale Act, 1882.

Although Phillimore J. in *Clark* v. *Balm, Hill & Co.* (1) commented adversely on the interpretation placed by Vaughan Williams J. upon the judgment of the Court of Appeal in *In re Standard Manufacturing Co.* (2) and decided that s. 17 of the Act of 1882 was not confined to debentures of companies in the case of which provisions had been made by the legislature for registration, yet that learned judge expressed no dissent from the decision of Vaughan Williams J. that the expression "incorporated company" in s. 17 did not include a society incorporated under the Industrial and Provident Societies Act, 1893, but on the contrary expressly stated that this point was concluded by the decision in *Great Northern Railway Co.* v. *Coal Co-operative Society.* (3) In these circumstances it is my plain duty to follow that decision.

This brings me to the respondent's second point, whether the debenture is good as regards the property of the Society other than "personal chattels." The question is in my opinion not free from doubt.

Mr. Swords on behalf of the liquidator admits that, if the debenture, instead of charging all the Society's property in general terms, had enumerated the different classes of property which the Society then possessed and which it might thereafter possess, the case would have been covered by the decisions in *In re Burdett* (4) and *In re Isaacson* (5), and that the debenture would have been good as to all classes of property so enumerated which did not consist of or include "personal chattels."

He submits, however, that inasmuch as the debenture charges all the property of the Society in general terms, the Court cannot sever "personal chattels" from the rest of the property, and that therefore the whole debenture is void. In support of this contention he relies mainly on the judgments of Lopes and Rigby L.JJ. in *In re Isaacson.* (5)

(1) [1908] 1 K. B. 667.
(2) [1891] 1 Ch. 627.
(3) [1896] 1 Ch. 187.
(4) 20 Q. B. D. 310, 315.
(5) [1895] 1 Q. B. 333.

Both in *In re Burdett* (1) and *In re Isaacson* (2) the Court held that an instrument purporting to charge both "personal chattels" and other property was valid as to the other property, although void as to the "personal chattels."

The principle upon which these cases were decided (as stated in *In re Burdett* (1)) is that an instrument giving a security on several properties is a security for the whole amount on each of those properties and on every part of each of them and that the excision of one property in law, by a statute, or, in fact, by an earthquake, effects a separation between the properties and withdraws that one of them from the operation of the instrument, but leaves the instrument intact and still operative as regards the rest. It is true that in *In re Burdett* (1) the properties charged were separately described; in my opinion, however, the Court did not base the principle upon the form of the instrument, but upon its nature and effect. The Court in that case, whilst recognizing the well-established rule that, unless you can on the face of the deed sever the illegal from the legal part of a covenant, the whole contract is void, held that this rule was inapplicable to the security there under consideration, regard being had to the object and purpose of the Bills of Sale Acts and to the special nature of an instrument of charge. In my judgment the principle of *In re Burdett* (1) is as much applicable to a case where a borrower having three farms situate in different parts of the same county charges those three farms under the general description of all his farms in that county, as it is to a case where under similar circumstances the borrower charges his three farms under the description of Farms A, B and C. In either case the excision of farm A in law (as e.g. by a statute preventing the borrower from charging farm A) or in fact (as e.g. by farm A being engulfed by an earthquake) would leave the charge intact and still operative as regards farms B and C. Moreover, one of the main grounds of the decision in *In re Burdett* (1) was that the Bills of Sale Acts were not concerned with the borrowing on any property other than "personal chattels"

(1) 20 Q. B. D. 310, 315. (2) [1895] 1 Q. B. 333.

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or with the forms of instruments by which each borrowing might be effected, and that therefore the Court ought to lean towards construing the Act of 1882 as affecting securities on "personal chattels" only and not securities on other kinds of property.

In the present case the object and purpose of the Legislature would be fully attained by cutting out from the security created by the debenture all "personal chattels" existing at the date of the winding up, which is the date when the charge attached upon the property of the Society. The policy of the Legislature in reference to securities on "personal chattels" does not require that the debenture should be altogether void, so as to destroy the security not only as regards the "personal chattels," but also as regards the rest of the property. I know of no case in which a security on "personal chattels" and on other property has been held to be void as regards such other property, because it also comprised "personal chattels," though, conversely, such a security has been held void as regards "personal chattels" because it also comprised (and therefore presumably created an effective charge upon) other property: see *Cochrane* v. *Entwistle*. (1)

As pointed out by the Court of Appeal in *In re Burdett* (2), what is avoided by s. 9 of the Act of 1882 is the "bill of sale," and not every instrument, of however complicated or comprehensive a nature, of which a bill of sale is part.

For the reasons stated I am of opinion that the principle of *In re Burdett* (2) applies to the debenture in the present case, and that the excision in law of the "personal chattels" from the charge created by the debenture has left it still operative as to the rest of the Society's property as it existed at the date of the winding up.

There remains to be considered, however, the question whether I am precluded by authority from deciding the present case according to the opinion I have expressed. In my judgment I am not so precluded. There is admittedly no case which decides the exact point that has arisen here.

(1) 25 Q. B. D. 116. (2) 20 Q. B. D. 310.

There are, however, certain passages in the judgments in the cases cited which have been rightly pressed upon me by counsel and which require consideration.

Lopes L.J. in *In re Isaacson* (1), referring, no doubt, to *In re Burdett* (2), states that it has been distinctly decided that a deed may be void as to part of it while it remains good as to the rest of it, "provided that the subject matter is so described as to be severable." I do not think, however, that the learned Lord Justice, when making this statement, had in his mind (or intended to express any opinion on) such a case as the present, nor do I think that he intended in any way to detract from the former of the two main reasons given by the Court of Appeal for its decision in *In re Burdett* (3) —namely, the object and purpose of the Bills of Sale Acts and the special nature of an instrument of charge.

Rigby L.J. in the same case states that "the piano could be struck out of the deed without affecting the hiring agreement." This statement had reference to the special circumstances of the case then before the Court. The hiring agreement related exclusively to the piano, and the interest of the borrower under the hiring agreement was the only interest which the borrower had in the piano; it was therefore essential to determine whether the Court could excise the piano from the deed and yet leave the deed operative as a charge upon the interest of the borrower in the piano under the hiring agreement. This amply accounts for the language used by the learned Lord Justice, which language, therefore, in my opinion affords no support to the argument that the learned Lord Justice considered the principle of *In re Burdett* (3) as applying only to a case where the "personal chattels" were on the face of the instrument severed from the rest of the property charged. The same considerations apply to *National P., &c. Bank* v. *Lindsell* (4), to which my attention has been called by Mr. Hunt since this case was argued.

As regards *In re Burdett* (3) itself, the Court of Appeal in stating the principle no doubt quotes as an illustration

(1) [1895] 1 Q. B. 333, 338.
(2) 20 Q. B. D. 310.
(3) 20 Q. B. D. 315.
(4) [1922] 1 K. B. 21.

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the case of a security given on "properties A, B and C"; but, as I have already endeavoured to explain, the principle laid down in that case does not, in my opinion, depend upon the separate description of those properties in the security, and the Court of Appeal nowhere states that it does so depend.

On the whole I have come to the conclusion, for the reasons stated, that I am not precluded by authority from applying what I consider to be the true principle to the facts of this case. I therefore hold that the debenture created a valid charge which attached upon all the property of the Society as it existed at the date of the winding up, with the exception of such property as consisted of "personal chattels."

Solicitors: *Rhys Roberts & Co., for David Hughes, Chester; Jaques & Co., for D. Howell Jones, Llanrwst.*

H. C. H.

RUSSELL J.

1922

March 24, 28.

In re FIFE'S SETTLEMENT TRUSTS.

[1921. F. 2572.]

Settled Land—Rebuilding Mansion House—"Annual rental of the settled land"—How to be ascertained—Income Tax—Estate Duty—Point of Time—Settled Land Act, 1890 (53 *&* 54 *Vict. c.* 69), *s.* 13, *sub-s.* (*iv.*).

Where half the amount of the annual rental of settled land is, under s. 13, sub-s. (iv.), of the Settled Land Act, 1890, to be repaid out of capital moneys towards the rebuilding of a mansion house, income tax and super tax, payable in respect of land, and of investments, for the time being, subject to the settlement, ought not to be deducted when ascertaining the value of the annual rental.

The decision of Warrington J. in *In re Windham's Settled Estate* [1912] 2 Ch. 75 on this point not adopted.

The property, settled by the settlement, was settled subject to the life estate of H. R. On the death of H. R. estate duty became payable in respect of the settled property:—

Held, that in ascertaining the amount of the annual rental of the settled land, neither the corpus nor income ought to be treated as being reduced by the amount of the estate duty payable in respect of the death of H. R.

The point of time at which the annual rental of the settled land is to be ascertained is the date on which the scheme of improvement is approved either by the trustees of the settlement or by the Court.

ADJOURNED SUMMONS.

This summons raised two questions under s. 13, sub-s. (iv.), of the Settled Land Act, 1890.

Under her marriage settlement, dated April 28, 1913, the defendant, Margaret Albert Fife, was tenant for life of settled estates, and her mother, the defendant M. E. Rutson, was contingently entitled in remainder. At the date of the settlement M. A. Fife (then M. A. Rutson) was entitled under the will of her grandfather, William Rutson, to two landed estates, known as the Nunnington Hall Estate and the Newby Wiske Estate, for a base fee in remainder expectant on the death without issue of her uncle, Henry Rutson, and certain investments representing the residuary personal estate of William Rutson were held by his trustees to pass with the two estates.

By the settlement Mrs. Fife conveyed to the Public Trustee the land in fee to the use, after the premises should have fallen into possession, that her husband, Ronald D'Arcy Fife, should during his life receive the yearly rentcharge of 2000*l.* per annum, and subject to that to the use of herself for life, with remainder to her issue as she should appoint, and in default of such issue to her mother if living at her death. She also assigned to the Public Trustee various investments, specified in a schedule, upon trust to sell the same with her consent, and invest the moneys arising thereby in the purchase of freehold hereditaments for an estate in fee simple to be conveyed and settled to the uses, upon the trusts, and with and subject to the powers and provisions thereinbefore declared and contained concerning the freehold hereditaments thereby settled, with power to postpone the sale of such investments for such period as might be thought desirable, and so that such investments and the moneys and investments for the time being representing the same or any part thereof respectively might in the meanwhile be dealt with and applied as if the same were capital moneys arising under the Settled Land Acts.

Henry Rutson died unmarried in November, 1920, and Mrs. Fife, in pursuance of a covenant contained in the

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settlement, executed a confirming deed enlarging the base fee, that enlargement being affected by a disentailing assurance of November 15, 1920.

Mrs. Fife executed various improvements under the Settled Land Acts, some of which involved works, including extension to the mansion house on the Nunnington Hall Estate. No scheme was prepared, but an application was made by her under the Act of 1890 for the approval of the extension, and for repayment in respect thereof. The matter came before Russell J. on July 27, 1921, when he authorized the Public Trustee, under s. 13, sub-s. (iv.), of the Act of 1890, to apply out of capital moneys a sum not greater than one-half of the annual rental of the estate, including as part of the annual rental the income derived from capital moneys.

The Newby Wiske Estate was sold in March, 1921, for 72,000*l.*, and completion took place in October of that year.

Questions having arisen as to the meaning of the annual rental of the estate, the Public Trustee took out this summons, asking whether in ascertaining the amount authorized to be expended he ought, (1.) to include the gross income of the investments of capital moneys and investments held as capital moneys without any deduction in respect of (*a*) income tax, (*b*) super tax; (2.) to include the gross rentals payable by tenants or only the net rentals after deduction of income tax by the tenants; (3.) to treat (*a*) the capital moneys, for the purposes of ascertaining the income thereof, as reduced by the amount of the estate duty paid in respect of the death of Henry Rutson, (*b*) the income of the Nunnington Hall Estate and the Newby Wiske Estate as reduced by the interest on the amount of the estate duty payable in respect of such death. The summons also raised the question whether any reduction ought to be made for the rentcharge of 2000*l.* per annum in favour of Mrs. Fife's husband.

When the summons came before the Court, the settled property consisted of the Nunnington Hall Estate, the proceeds of sale of the Newby Wiske Estate, and the scheduled investments.

Nicholson Combe for the Public Trustee.

Clauson K.C. and *Leeke* for the tenant for life. The "annual rental" referred to in s. 13, sub-s. (iv.), of the Settled Land Act, 1890 (1), must mean the income derived from the settled land before deduction of income tax. It would be impossible to argue otherwise, if it were not for the decision of Warrington J. in *In re Windham's Settled Estate.* (2) In that case, however, the point was not properly argued, counsel for the tenant for life having, in fact, admitted that the deduction might be made. The decisions of the same learned judge in *In re Sturmey Motors, Ld.* (3), and *North London and General Property Co.* v. *Moy, Ld.* (4), show clearly that if his attention had been properly called to the point in *In re Windham's Settled Estate* (2) he would have decided otherwise. There is no authority for saying that, in ascertaining the "annual rental," a deduction should be made for the income tax which a tenant pays to the revenue authorities; such tax is part of the rent. There are expressions in *In re Windham's Settled Estate* (2) suggesting that Warrington J. took a different view, but there is nothing in that case to bind this Court in principle. In *Duke of Beaufort* v. *Inland Revenue Commissioners* (5) the Court of Appeal considered the meaning of the words "rental value" in s. 20 of the Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8). That section, however, dealt with mineral rights, and this case is not affected by it.

With regard to the estate duty paid and to be paid, that is on the same footing as any other encumbrance, and it is well settled that in ascertaining the annual rental of an estate the charges on encumbrances are not deducted.

Then there remains the question, not specifically raised by the summons, as to the point of time to be taken in

(1) Settled Land Act, 1890, s. 13: "Improvements authorised by the Act of 1882 shall include the following, namely:—

"(iv.) The rebuilding of the principal mansion house on the settled land: Provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land."

(2) [1912] 2 Ch. 75.

(3) [1913] 1 Ch. 16.

(4) [1918] 2 K. B. 439.

(5) [1913] 3 K. B. 48.

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ascertaining the annual rental of the estate. It ought not to be a date later than that on which the scheme was sanctioned, either by the Court or by the trustees. To take any other date would raise very great difficulties.

H. S. Howard for the remainderman. Taxes of every kind, including super tax, ought to be deducted when ascertaining the annual rental. The expression " annual rental " is not to be found anywhere else in the Settled Land Acts. Sect. 13, sub-s. (iv.), of the Act of 1890 shows that the Legislature intended to limit the amount of expenditure. " Annual rental " must mean the amount of profits and income available for the purposes of the settlement. It cannot include moneys not received for those purposes. No distinction can be drawn between income tax and super tax : *Bowles* v. *Attorney-General* (1) ; *Brooke* v. *Inland Revenue Commissioners.* (2)

The capital which had to be raised to pay the estate duties was not capital which came into the settlement, and it must be deducted.

It is impossible to contend that the rentcharge or interest on mortgages ought to be deducted.

The point of time to be taken in ascertaining the annual rental cannot be later than when the scheme was sanctioned by the Court.

Clauson K.C. in reply.

RUSSELL J. It is clear from the authorities that, for the purpose of arriving at the annual rental, the annual income derived from the capital moneys must be included with the annual rental of the settled land strictly so called. But the question raised on this summons is whether in arriving at the annual rental certain sums are to be deducted. The first two questions raised by the summons are whether the gross income of investments representing capital moneys should be included without deduction of income tax and super tax and whether the gross rentals should be included or only the net rentals after deduction of income tax by the tenants.

(1) [1912] 1 Ch. 123. (2) [1918] 1 K. B. 257.

The first thing I direct my attention to is whether income tax should be deducted. As regards that question one case has been cited as an authority for the proposition that you should deduct income tax—a case which came before Warrington J., of *In re Windham's Settled Estate.* (1) The relevant words of the headnote are as follows: "The words 'annual rental' in the proviso to sub-s. (iv.) must be read literally and mean the total amount of the rents payable by the tenants to the landlord as appearing in the estate rent-book, subject to the modification that, if any part of the land is temporarily unlet, it must for the purpose of the sub-section be treated as producing the rent which an occupying tenant would usually pay for it. In estimating the amount, therefore, of the 'annual rental' no deductions can be made for mortgage interest, tithes, land tax, drainage rates, or rent charges. Property tax, however, may be deducted." Turning to the body of the report we find that counsel, who appeared for the tenant for life, conceded the point. Whether it was not worth disputing owing to the rate of income tax in those days I do not know. The figures in the case are puzzling. The amount expended by the tenant for life was 5127*l.* It is stated that the "gross income" of the estate was 4265*l.* It is further stated that after deducting certain outgoings (viz., tithes, land tax, drainage rates, a rent charge, and mortgage interest) there was a "net income, exclusive of property tax and cost of repairs, of 2171*l.* 19*s.* 3*d.*" After stating these figures Warrington J. in his judgment proceeds as follows (2): "The question is whether the annual rental referred to in sub-s. (iv.) of s. 13 of the Act of 1890 is the 4265*l.* or whether it is the 2171*l.* 19*s.* 3*d.* In the first place the word is 'rental.' It is not 'income' or 'revenue,' or any expression of that kind, which points to the personal enjoyment by any person, and in accordance with that view it has already been decided in *In re Kensington Settled Estates* (3) that the cost of repairs is not to be deducted in ascertaining what is the

(1) [1912] 2 Ch. 75. (2) [1912] 2 Ch. 79.
(3) (1905) 21 Times L. R. 351.

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'annual rental.' On the other hand, I am of opinion that property tax may be deducted, because that is retained by the tenant before he pays his rent. It seems to me the only principle on which one can proceed in interpreting this sub-section is to read the word 'rental' literally as it stands, and I think 'rental' means the total amount of the rents payable by the several tenants to the landlord or his agent, that is to say, the total amount appearing in the rent-book which I suppose most landlords would keep, showing the rents paid by their several tenants. In this particular case that amount will be the 4265*l.* It seems to me that when the sub-section speaks of 'annual rental' —not gross rental or net rental, but simply 'annual rental' —it means the sum of the rents paid by the several tenants with, of course, this modification, that if any part of the land is temporarily vacant then one is entitled, for the purpose of applying the sub-section, to treat it as producing the rent which a tenant occupying it usually pays. I think, therefore, the mortgage interest, at all events, ought not to be deducted before ascertaining the rental. I also think that there ought to be no deductions for tithes, land tax, drainage rates, or the rentcharge. The tenant for life will therefore be allowed one-half of the 4265*l.*, that is 2132*l.* 10*s.*, in respect of the rebuilding of the mansion house." The learned judge has expressed his opinion that the property tax may be deducted. If, as I must assume to be the case, the 4265*l.* had been arrived at (although described as gross income) after deducting the property tax he is giving effect to that view; but this view seems to me inconsistent with his opinion that "rental" means the total amount of rents payable by the tenants and appearing in the landlord's rent-book. At all events, I cannot consider this as a decision of the learned judge after argument upon the point. The point was conceded, and upon that concession he expressed his own view that the income tax was properly deducted. Speaking for myself I do not share that view, and if the learned judge's attention had been called, as it was called in a subsequent case, to what the true position is when the tenant pays income

tax and then deducts it from the rent, he would, I think, have taken a different view. If this is to be treated as a decision upon the point I do not agree with it, and in the circumstances of its having been given without argument, I do not feel bound in any way to follow it.

That the learned judge was fully aware of the true position appears from other cases which came before him raising this point of the payment of income tax by a tenant. In *In re Sturmey Motors, Ld.* (1), the head-note is as follows. "By a lease dated in 1907, certain premises were demised to a company, and the company thereby covenanted to pay the rent and taxes in respect thereof, except land tax and landlord's property tax. The company never paid any of the rent reserved, but made certain payments in respect of landlord's property tax. In 1911 a debenture holders' action was commenced and a receiver appointed. Subsequently the lessor threatened to distrain for the rent in arrear, and in order to avoid distress the receiver signed an undertaking by which he undertook to pay an occupation rent, and also to pay the 'arrears of rent' then owing out of a particular fund. The receiver paid one year's landlord's property tax, and subsequently made a payment of occupation rent without deducting anything for property tax. *Held*, that the joint effect of Sch. (A), No. iv., r. 9, of the Income Tax Act, 1842, and s. 40 of the Income Tax Act, 1853, was to treat the payment by a tenant of landlord's property tax as a pro tanto payment of rent. *Held*, therefore, that the receiver was entitled to deduct the payments made by the company and himself in respect of landlord's property tax from any future payments of rent to be made by him under his undertaking." The learned judge, having cited the material provisions of the Act, said (2): "Therefore the effect of that provision is that the tenant paying the tax is, under the last words I have read, to be acquitted and discharged of so much money as if it had been actually paid to the person to or for whom his rent shall have been due and payable, and the rent to that extent is discharged and no longer payable to the landlord."

(1) [1913] 1 Ch. 16. (2) [1913] 1 Ch. 16, 21.

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In a later case of *North London and General Property Co.* v. *Moy, Ld.* (1) the learned judge states the point in this way: "On the language of the section,"—that is the section of the Income Tax Act—"by proving that the tax had been paid the defendants proved that the rent had been paid and that it had been paid to the person entitled to demand it." In other words, payment of the tax is a payment of the rent. Or as Buckley L.J. put it in delivering judgment in the case of the *Duke of Beaufort* v. *Inland Revenue Commissioners* (2) the effect of the statute is that the property tax is a portion of the rent.

It appears to me that the true view is this, that in ascertaining the annual rental of the settled land, property tax should not be deducted from it, because payment of the property tax is a payment pro tanto of the rent; the annual rental means the gross amount of the rents reserved as payable by the tenants. It was said that the case which I last cited was against that view. The Finance (1909-10) Act imposed a mineral rights duty upon the rental value of all rights to work minerals, and rental value was defined in the Act as being the amount of rent paid by the working lessee in the last working year in respect of the right. The Court held that under the special definition in that particular Act, the rental value was to be ascertained, not by reference to the gross rent reserved, but by reference to the actual amount paid in the last year, which would be the gross rent less the income tax. That case is of no assistance to me in construing the words "annual rental of the settled land."

In my opinion, notwithstanding the decision in *In re Windham's Settled Estate* (3), in ascertaining the annual rental of the settled land under s. 13, sub-s. (iv.), of the Settled Land Act, 1890, the property tax ought not to be deducted. No distinction can be drawn between income tax and super tax.

My remarks about income tax and super tax apply also to the income derived from investments representing capital moneys.

(1) [1918] 2 K. B. 439, 445. (2) [1913] 3 K. B. 48.
(3) [1912] 2 Ch 75.

The next question which is raised is as regards the deduction of the jointure rentcharge of 2000*l.* a year payable to Ronald D'Arcy Fife, the settlor's husband. Mr. Howard appearing for the remainderman has not contested or suggested that any deduction should be made in respect of that, and in my opinion he adopted a perfectly correct attitude in that regard.

The next point arises in this way. It is in reference to estate duty which will have to be paid shortly, and with reference to the interest on other estate duty which is payable by instalments. The facts as regards these points stand as follows. Henry Rutson died in November, 1920. Newby Wiske was sold, and estate duty was payable in respect of Henry Rutson's death on the proceeds of sale of Newby Wiske; estate duty will also be payable as regards the scheduled investments. Secondly, with regard to the Nunnington Hall estate, duty will also have to be paid in respect of that, and the question I am asked in the summons is whether one ought to treat (*a*) the capital moneys "as reduced by the amount of the estate duty paid thereout in respect of the death of Henry Rutson deceased, subject to whose life estate the property settled by the said settlement was settled," and "(*b*) the income of the said Nunnington Hall estate as reduced by the interest on the amount of the estate duty payable thereon in respect of such death." In my opinion neither the capital monies nor the income of the Nunnington Hall estate ought to be treated as being so reduced. These matters appear to me to stand exactly in the position of mortgages upon the estate; and as regards mortgages, *In re Windham's Settled Estate* (1) is a decision, after argument, that the interest on the mortgages should not be deducted in ascertaining the rent. I think the true view of s. 13 is that, for the purpose of fixing the maximum sum which may be spent upon rebuilding the mansion house, you must look at the annual amount of the rent roll. The figure is not fixed by reference to net value at all; it is fixed by reference to the rent roll of the estate, the annual rental

(1) [1912] 2 Ch. 75.

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payable by the tenants; under other decisions, there ought to be included in the figure the income of capital moneys which might otherwise be invested in land, and producing rent. Accordingly I answer the two last questions raised by the summons by declaring that the capital moneys and the income referred to ought not to be treated as reduced in the manner suggested by the summons.

The only other point which remains is not specifically referred to in the summons. It is the question as to what point of time is to be taken in ascertaining the annual rental of the estate under s. 13. It appears to me the proper time to take is the time when the particular scheme becomes an authorized scheme. If it is a scheme submitted to the trustees, and authorized by them, the date of authorization would, in my opinion, be the proper time to take. In the case before me, the scheme having been brought before the Court, the proper time at which to ascertain the annual rental of the estate is the date of the order of the Court approving the scheme, which is July 27, 1921.

Solicitors: *Trotter, Goodhall & Patteson.*

P. J. B.

RUSSELL J.

1922

April 26, 27.

In re JUPP.

HARRIS *v.* GRIERSON.

[1921. J. 3880.]

Will—Legacy—Satisfaction—Moral Obligation other than Parental and Unexpressed—Particular Purpose.

A legacy of 500*l.* to the trustees of a fund the income of which was to be expended in making up the aggregate income of three sisters, strangers to the testator, to a certain sum, and in meeting their extraordinary expenses incurred through illness or other causes, is a legacy for a particular purpose, and is pro tanto satisfied by a subsequent gift of 500*l.* War Loan 5 per cent. bearer bonds to the same trustees for the same purpose, the 500*l.* and the bearer bonds being ejusdem generis.

A legacy given in fulfilment of a moral obligation is not, unless expressed to be so made, pro tanto satisfied by a subsequent gift to the same trustees for the same purpose.

ADJOURNED SUMMONS.

A Dr. Bywater, who died in 1914, left three sisters, whom he had in part maintained in his lifetime, surviving him. It was anticipated that the sisters would only receive from his estate a sum of 60*l.* yearly and in order to augment that sum the Dr. Bywater Memorial Fund was established by some of his friends of whom the testator, Dr. Jupp, was one. The trusts of the fund were declared by a deed poll dated April 30, 1914, under which the trustees were to invest the fund and hold it upon trust to pay to the sisters during their joint lives, and so long as they should all remain unmarried, such a sum as, with the income derived by them under Dr. Bywater's will, would make up their aggregate income to 160*l.* a year. In the event of one sister dying or marrying the trustees were to pay to the two survivors during their joint lives, or until one of them should marry, such a sum as, with the income derived by the two under Dr. Bywater's will, would make up the aggregate income of the two sisters to 160*l.* a year. If and when there was only one sister living and unmarried the trustees in the same way were to make up her income to 100*l.* a year for her life or until she married.

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In the case of the sisters incurring extraordinary expenses through illness or other causes the trustees were empowered to pay them additional sums. From and after the death or marriage of all the sisters the trustees were to stand possessed of the fund upon trust to divide the same amongst the subscribers to the fund in proportion to the amount of their respective subscriptions. The testator, who was a trustee of the fund, during his life made several contributions to it, and by his will dated June 19, 1916, declared: "Whereas it is my desire and intention to pay the sum of 500*l.* to the trustees of a fund established on the death of my late friend Dr. Bywater for the benefit of his sisters and may pay the same or some part thereof in my lifetime to the said fund Now if the said sum of 500*l.* or any part thereof remains unpaid by me at the time of my death I direct my trustees out of my personal estate to pay the same or such sum as shall if added to any sum which I may pay to the fund in my lifetime make up my full donation of 500*l.* and I direct that such payment shall be made free of all legacy or other death duties." That gift was revoked by a codicil to the will of the testator dated October 23, 1919, by which he provided: "I also give to the trustees of the Dr. Bywater Fund the sum of 500*l.* free of all duties for the purposes in all respects of such Memorial Fund." At that date the testator had contributed to the fund nearly 500*l.* Then the testator proceeded to confer a further benefit in the event of his estate reaching a certain figure, which in fact it did not. "I also give to my trustees in addition for the purposes of such fund such a sum as shall represent fifteen per cent. of the net value of my estate over and above the sum of 8000*l.*" A year later, in November, 1920, the testator bought 500*l.* War Loan 5 per cent. bearer bonds which he directed his bankers to hold for the trustees of the Bywater Memorial Fund. This summons was taken out by the trustees of the will to determine whether the legacy of 500*l.* in the codicil to the trustees of the Bywater Memorial Fund was satisfied by testator's gift to the trustees in 1920, of 500*l.* War Loan 5 per cent. bearer bonds.

L. F. Potts for the trustees of the will.

G. B. Hurst K.C. and *W. H. Horsley* for the trustees of the Dr. Bywater Memorial Fund. The gift of the War Loan bearer bonds was not a satisfaction, even in part, of the legacy of 500*l.* The rule is that where the testator stands neither in the natural nor the assumed relation of a parent to a legatee, the legacy will be considered as bounty, and it is not satisfied by a subsequent advancement, unless the legacy is given for a particular specific purpose, and the subsequent advancement is for the same purpose: *Pankhurst* v. *Howell.* (1) Where a legacy is given in such general terms as here it excludes the idea of a particular purpose. The same principle was applied in *In re Pollock* (2), but it was proved by extrinsic evidence that the subsequent gift was given for the same purpose as the original one which was held to be pro tanto satisfied. In this case the correspondence shows that the testator did not intend to satisfy the gift of the 500*l.* by the gift of the War Loan bearer bonds. A legacy to A. in trust for B., a stranger, is not a legacy for a particular purpose within the rule: *In re Smythies.* (3) Neither is the gift of 500*l.* to the trustees of the Dr. Bywater Memorial Fund for the benefit of his three sisters. In *In re Corbett* (4) the testator bequeathed "to the trustees of the Infirmary, Worcester, 1000*l.*; to the trustees of the endowment fund of the Corbett Hospital, Stourbridge, 10,000*l.*" The first was held to be a general gift, the second to be a gift, not for the general purposes of the hospital, but for a particular purpose, the endowment of the hospital. The gift here is for the general purposes of the Dr. Bywater Memorial Fund. The testator does not disclose by his codicil that he had any particular object of the Bywater trust in view. An advancement must, to be a satisfaction of a legacy, be ejusdem generis: *Holmes* v. *Holmes.* (5) It is submitted that the legacy of 500*l.* and the War Loan bearer bonds are not ejusdem generis. There has been no satisfaction of the

(1) (1870) L. R. 6 Ch. 136.
(2) (1885) 28 Ch. D. 552.
(3) [1903] 1 Ch. 259.
(4) [1903] 2 Ch. 326.
(5) (1783) 1 Bro. C. C. 553, 555.

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legacy of 500*l.* and the trustees of the Dr. Bywater Memorial Fund are entitled to it.

Stamp for residuary legatees. In a proper case money's worth operates as satisfaction of a gift of money. Thus in *Pym* v. *Lockyer* (1) Government Stock was held to be pro tanto a satisfaction of a gift of money, and in *Hoskins* v. *Hoskins* (2) a father's purchase for 650*l.* of a cornetcy for his son was held to be an ademption, pro tanto, of a legacy of 750*l.* to his son. This fund was an endowment fund, and the legacy to the trustees of the fund was a legacy for a particular purpose, and was therefore satisfied by the subsequent gift of War Loan bearer bonds for the same purpose : *In re Corbett.* (3) To constitute a particular purpose it is not necessary that some special use or application of the money should be in the testator's mind, it is enough if the bequest is made in fulfilment of some moral obligation recognized by the testator : *In re Pollock.* (4) It is true that Lord Selborne in that case used the words " expressed to be made in fulfilment of some moral obligation," but, as was pointed out by North J. in *In re Fletcher* (5) : " No doubt Lord Selborne does refer to the case where there is a reference to the purpose in the will. Such reference may be and is a very material circumstance, but I do not understand that the Lord Chancellor was exhaustively laying down the law." It is clear from the correspondence and the affidavits that the gifts were made to satisfy what the testator considered to be a moral obligation. If the testator stood in loco parentis to the beneficiaries that evidence would be admissible, and there is no reason in principle why it should not be admissible here. If the Court comes to the conclusion that the first gift was made to fulfil a moral obligation then it is submitted that it was satisfied by the subsequent gift of War Loan bearer bonds : *In re Pollock.* (4)

W. G. Hart for a residuary legatee argued to the same effect.

(1) (1841) 5 My. & Cr. 29.
(2) (1706) Prec. Ch. 263.
(3) [1903] 2 Ch. 326.
(4) 28 Ch. D. 552.
(5) (1888) 38 Ch. D. 373, 376.

RUSSELL J. [after stating the facts continued:] Stated shortly the Dr. Bywater Memorial Fund was a fund established for the purposes of endowing, during life or spinsterhood, Dr. Bywater's three sisters, with an ultimate trust in favour of the subscribers to the fund.

The testator made several contributions to the fund during his lifetime, and, by his will, made in 1916, he directed his trustees to pay to the trustees of the fund such a sum as, added to what he had given in his lifetime, would make up 500*l.* At that time the testator contemplated a gift of 500*l.* as a maximum. By 1919 the testator had contributed nearly 500*l.*, and, in his desire that the fund should be a success, he revoked the gift in his will, and by a codicil substituted a gift of 500*l.*, without any restrictions as to the amounts he had already contributed, and also gave an additional sum if his estate realized more than 8000*l.* The question to be determined is whether that legacy of 500*l.* by the codicil to the testator's will was pro tanto satisfied by a subsequent gift by the testator of 500*l.* bearer bonds to the same trustees for the same purpose.

This is a case of a benefit conferred upon strangers, and not one where the testator stood in loco parentis to the beneficiaries, there is therefore no presumption that the gift inter vivos was wholly, or in part, an ademption or satisfaction of the legacy. In the language of Swinfen Eady J. in the case of *In re Smythies* (1): "The legacy was a general legacy payable out of general personalty, and, no case of loco parentis being made, it was a legacy to a stranger. It is, therefore, not adeemed unless it appears on the face of the codicil to have been given for a particular purpose, which is satisfied by the subsequent settlement. The question is, therefore, whether the legacy to the trustee for the benefit of the great-niece was given for a particular purpose within that rule." Mr. Hurst on behalf of the trustees of the Bywater Memorial Fund contended that the legacy had not been adeemed by the gift inter vivos. He said that a gift inter vivos could not be an ademption or satisfaction of a legacy unless the legacy was for

(1) [1903] 1 Ch. 259, 260.

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a particular purpose, which was satisfied by the subsequent advancement, and unless the legacy and advancement were ejusdem generis, and he contended that 500*l.* War Loan 5 per cent. bearer bonds, and 500*l.*, were not ejusdem generis. In my opinion that is not so. The cash and the bearer bonds are ejusdem generis for this purpose, and, if the other essentials are present, there would be a satisfaction of the legacy. That is clear from the decisions in *Pym* v. *Lockyer* (1) and *Watson* v. *Watson*. (2)

A further point was raised by Mr. Stamp on behalf of the residuary legatees. He said that if it were shown that the legacy were given by the testator because of a moral obligation under which he conceived himself to be, even if it were not given for a particular purpose, a subsequent gift inter vivos would be a substitution for, or an ademption of the legacy. In support of that statement he relied upon *In re Pollock* (3) which was a case where a widow, Frances Pollock, had, under her husband's will, in which he expressed a desire to benefit his niece, succeeded to his whole estate. By her will dated October 24, 1874, Frances Pollock bequeathed to the niece of her deceased husband, John H. Pollock, 500*l.* "according to the wish of my late beloved husband." In July, 1881, she sold out some stock to which she was entitled, and out of the proceeds paid to the niece the sum of 300*l.*, making contemporaneous entries relative to such payments in her diary, in one of which it was described as "the legacy," and in another as "being a legacy from her (the niece's) uncle John." The question was whether the legacy of 500*l.* was adeemed or satisfied wholly or in part by the donation of 300*l.*, and it was held that it was.

The Earl of Selborne L.C. in his judgment said: "When a testator gives a legacy to a child, or to any other person towards whom he has taken on himself parental obligations, and afterwards makes a gift or enters into a binding contract in his lifetime in favour of the same legatee, then (unless there be distinctions between the nature and conditions

(1) 5 My. & Cr. 29. (2) (1864) 33 Beav. 574.
(3) 28 Ch. D. 552, 555, 556.

of the two gifts, of a kind not in this case material) there is a presumption prima facie that both gifts were made to fulfil the same natural or moral obligation of providing for the legatee; and consequently that the gift inter vivos is either wholly or in part a substitution for, or an 'ademption' of the legacy. . . . . The presumptions arising out of the parental relation do not of course extend to any case in which the legatee is a stranger to that relation. But numerous authorities have determined that if a legacy appears on the face of the will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a similar presumption is raised prima facie in favour of ademption. And it is clear from the authorities that evidence of the circumstances under which the subsequent gift was made, including contemporaneous or substantially contemporaneous declarations of the donor (whether communicated to the donee or not), may be admissible in such a case. To constitute a particular purpose within the meaning of that doctrine it is not, in my opinion, necessary that some special use or application of the money, by or on behalf of the legatee (e.g. for binding him an apprentice, purchasing for him a house, advancing him upon marriage, or the like), should be in the testator's view. It is not less a purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfilment of some moral obligation recognised by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognised, or would have presumed to exist. And it appears to me that a case of this kind comes very near, in principle, to the first class of cases, in which ademption by a subsequent gift is inferred from the parental relation. The reasonable presumption is the same, namely, that as the purpose of both gifts was to fulfil one and the same antecedent obligation or duty, a double fulfilment was (presumably) not intended." The Lord Chancellor then pointed out that the gift was made in order to fulfil the moral obligation imposed on the widow

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by her husband. It was argued that in this case the evidence showed that the testator felt morally bound to contribute to the Bywater Fund, and that, as the legacy and the gift inter vivos were given to fulfil the same obligation, and a double fulfilment would not be presumed, the gift was pro tanto an ademption of the legacy.

In my opinion there is no evidence to show that the testator deemed himself to be under any moral obligation to contribute to the Bywater Fund. All that the evidence amounts to is, that the testator was grateful to Dr. Bywater for his attentions to him during illness, and that he was anxious to help Dr. Bywater's sisters. That falls very short of showing that the testator felt under any moral obligation to contribute to the fund to provide annuities for the sisters. Even if I thought that the gift by the testator had been made under the sense of a moral obligation, I should be bound to adhere to Lord Selborne's view that the bequest must be expressed to be made in fulfilment of the moral obligation.

The next question is whether the legacy was given for a particular purpose. In my opinion it was. The gift to the trustees was made in order to assist in the endowment of these ladies, and the gift of the War Loan bearer bonds in the testator's life time was for the same purpose.

In the case of *In re Smythies* (1) the gift was in these terms : "I give and bequeath to Mrs. Georgiana Sophia Smythies the legacy or sum of 500*l.* free of all estate or other duty, in trust for my great niece Eva Marian Smythies for her own sole use and benefit, and I direct that such legacy shall be paid to the said Eva M. Smythies either in whole or in part at such time or times and in such manner as the said Georgiana S. Smythies may in her discretion think fit." In substance and in fact that was a bequest to a trustee of 500*l.* for the absolute benefit of A. which A. was entitled to claim. By a subsequent settlement the testator, after reciting that he was desirous of making some provision for his great-niece and had paid to the trustee the sum of 500*l.* to be held by her upon the trusts thereinafter contained (that is, for the use and benefit of his

(1) [1903] 1 Ch. 259.

grand-niece absolutely) declared that the trustee should retain the said sum of 500*l.* in trust to invest the same and apply the income therefrom for the maintenance, education, and benefit of his great-niece until she should attain the age of twenty-fours years or marry under that age, and on her attaining that age or marrying to pay the principal to her. In the case of the great-niece dying before she attained the age of twenty-four years or marrying there was a gift over in favour of the settlor. It was argued that the legacy was given to the trustee for the use and benefit of the grand-niece and that, that being a particular purpose within the rule, the legacy was adeemed by the settlement of the same sum for the same purpose, although the limitations were somewhat different, but Swinfen Eady J. held that no particular purpose was indicated in the codicil and that the legacy was not adeemed. The learned judge pointed out that in *Pankhurst* v. *Howell* (1), where a testator gave his wife a legacy of 200*l.* to be paid within ten days after his decease, and shortly before his death gave her 200*l.* in order that she might have a sum of money which she could control immediately on his death, without the interference of the executors, it was held that the legacy was not adeemed, since providing the wife with ready money immediately after the testator's death was not a particular purpose within the rule which, as James L.J. said (2), referred to "a legacy given for a particular specific purpose, as for instance a legacy given to purchase an advowson for a son, which would be adeemed, or perhaps it would be more correct to say satisfied, by the father afterwards purchasing the advowson for him." The legacy must not be given merely for bounty but for a particular specific purpose, to constitute which, as Lord Selborne L.C. said in *In re Pollock* (3), it was not necessary that some special use or application of the money, by or on behalf of the legatee, should be in the testator's view but that the rule extended to a case where the bequest was expressed to be made in fulfilment of some moral obligation appearing on the face of the will. Swinfen Eady J.

(1) L. R. 6 Ch. 136. (2) L. R. 6 Ch. 136, 138.
(3) 28 Ch. D. 552, 556.

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then said that no authority had been cited to him to show that a mere legacy to A. in trust for the benefit of B., an infant, was a legacy for a particular purpose within the rule and held that the legacy was not adeemed. Mr. Hurst relied upon *In re Smythies* (1) and submitted that the bequest to the trustees of the Bywater Memorial Fund was similar to the bequest to the grand-niece, but *In re Smythies* (1), as Farwell J. pointed out in *In re Corbett* (2), was decided on the ground that a gift to A. in trust for B. was the same as a gift to B. The testator in *In re Corbett* (2) bequeathed 1000*l.* to the trustees of the Infirmary, Worcester, and 10,000*l.* to the trustees of the endowment fund of the Corbett Hospital, Stourbridge. After the date of his will the testator sent a cheque for 10,000*l.* to the trustees of the Corbett Hospital which, as the evidence showed, was for the purpose of endowing the hospital. It was held that the legacy was adeemed. Farwell J. said: "The question is whether the legacy is adeemed, and that turns on the question whether this is a gift for a particular purpose or whether it is not. The testator has made two consecutive gifts: 'To the trustees of the Infirmary, Worcester, 1000*l.*; to the trustees of the endowment fund of the Corbett Hospital, Stourbridge, 10,000*l.*' The first one is obviously a general gift, and the trustees of the hospital may do as they please with it; but the object of the testator's bounty in the second is the Corbett Hospital endowment fund. The trustees cannot do as they please with it, but are prevented from spending the money as they please, and are bound to treat it as an endowment fund, using only the income of it. A gift to trustees for the purpose of apprenticing A. B., a stranger, or a gift to trustees for the purpose of making an endowment for the benefit of A. B., a stranger, for his life with remainder to his children, would, in my opinion, both be gifts for a particular purpose. . . . . The case before me is the creation of a fund the income of which goes in perpetuity, not for the general purposes of the hospital, but for the endowment of the hospital. In my opinion this is a particular purpose, and therefore, as the letters show that the gift of 10,000*l.*

(1) [1903] 1 Ch. 259. (2) [1903] 2 Ch. 326, 328.

afterwards was also for the purpose of endowing the hospital, the legacy is adeemed." I think this case falls exactly within that decision. The gift to the trustees of the Bywater Fund was a gift to create a fund the income of which was to go for the endowment of these ladies for life. That was a gift for a particular purpose, and, the subsequent gift of the War Loan bearer bonds being for the same purpose, the legacy is pro tanto adeemed. I accordingly declare that the gift of the bonds satisfies the legacy of 500*l.* to the extent of the price paid for the bonds.

Solicitors: *Ford, Lloyd & Co.; Peacock & Goddard.*

J. B. B. M.

In re H. J. WEBB AND COMPANY (SMITHFIELD, LONDON), LIMITED.

C. A. 1921 *Dec.* 16. 1922 *Jan.* 11; *April* 10.

[00259 of 1920.]

Company—Voluntary Winding Up—Crown Debts—Prerogative—Right to Priority of Payment—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 133—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 32—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 40, 150—*Companies Act*, 1883 (46 & 47 *Vict. c.* 28), *s.* 4—*Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 *Vict. c.* 62), *s.* 1—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 186, *sub-s.* 1; *ss.* 207, 209, *sub-s.* 1 (*a*)—*Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 33, 151—*New Ministries and Secretaries Act*, 1916 (6 & 7 *Geo.* 5, *c.* 68), *ss.* 3, 4, 117.

Since the passing of the Preferential Payments in Bankruptcy Act, 1888, *In re Henley & Co.* (1878) 9 Ch. D. 469 has ceased to be directly applicable to the case of a winding up of a company. The prerogative right of the Crown in a winding up to payment of its debt in priority to all the other creditors of the company has now been abrogated by the Companies (Consolidation) Act, 1908.

APPEAL from the decision of P. O. Lawrence J. (1)

Under the provisions of the New Ministries and Secretaries Act, 1916, and certain regulations made under the Defence of the Realm Consolidation Act, 1914, the company was

(1) [1921] 2 Ch. 276.

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appointed by the Food Controller as one of his agents on commission for the sale and distribution of frozen rabbits imported by the Board of Trade under contracts with certain State Governments in Australia. The company made contracts for sale on behalf of the Food Controller, delivered to the respective purchasers the rabbits sold under the contracts, and collected the purchase moneys, but failed to account for the whole of them to the Food Controller. On July 9, 1920, the company went into voluntary liquidation and at that date owed the Food Controller the sum of 9689*l.* 5*s.* 10*d.* for moneys so collected. The company was insolvent. The Food Controller lodged a proof in the winding up for the above-mentioned amount and claimed priority of payment over all the other creditors of the company on the ground that it was a Crown debt. The liquidator admitted the proof, but denied that the debt was a Crown debt, and contended that, even if it were, it was only entitled to a dividend pari passu with all the other creditors of the company. Upon a summons issued by the Food Controller to have the matter determined, P. O. Lawrence J. held that the debt was a Crown debt, and that the Food Controller was entitled to priority of payment. In coming to this conclusion he held that he was bound by the decision in *In re Henley & Co.* (1)

The liquidator appealed.

Sir J. Simon K.C., *R. M. Montgomery K.C.* and *L. W. J. Costello* for the appellant. It is now admitted that the debt is a Crown debt, but the learned judge was wrong in holding that the case is governed by the decision in *In re Henley & Co.* (1) With regard to the legislation on this subject a distinct line of division was drawn in 1888. Before that date there was no provision such as was made by the Preferential Payments in Bankruptcy Act, 1888, which brought the distribution of assets in the winding up of a company into line with the distribution in the bankruptcy of an individual. The legislation has now been brought together in the Companies (Consolidation) Act, 1908.

(1) 9 Ch. D. 469.

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Sect. 209 of that Act may be traced back to s. 1 of the Preferential Payments in Bankruptcy Act, 1888, while s. 207 is to be traced back to s. 10 of the Judicature Act, 1875.

Contrasting the position in bankruptcy with that in winding up, before 1888, the Bankruptcy Act, 1883, s. 150 provided: "Save as herein provided the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge, shall bind the Crown." There was no such provision in the Bankruptcy Act, 1869. Sect. 40 of the same Act of 1883 also bound the Crown, giving priority of payment to certain taxes, and enacting, by sub-s. 4, that "subject to the provisions of this Act all debts proved in the bankruptcy shall be paid pari passu." Sect. 40 of the Act of 1883 is in substance the same as s. 32 of the Bankruptcy Act, 1869. Taking the position as it used to be under winding up, it is clear that under the Companies Act, 1862, the Crown was not bound. Next comes the question of the effect of s. 10 of the Judicature Act, 1875, which provided that "in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company . . . whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." That section has been construed to include the principles applicable to the priorities of debts as well as to their proof and to assimilate the rights of creditors of a company in liquidation to those of creditors of a bankrupt.

Reference may now be made to the following authorities:

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In re Leng (1); *In re Heywood* (2); and *In re Whitaker* (3), in which *In re Maggi* (4) was disapproved by the Court of Appeal. The effect of those three decisions is to show that the words in s. 10 of the Judicature Act, 1875, "the same rules shall prevail as to debts provable" are wide enough to bring in that part of the bankruptcy law which directs which kind of debt is to be paid in priority to others. In other words the rules in bankruptcy as to debts and liabilities provable include all rules as to priorities expressly enacted by any statute and made applicable in the event of bankruptcy. It is submitted that when Parliament dealt with this matter by way of consolidation in the Companies (Consolidation) Act, 1908, it had regard to these decisions. But then came the decision in *In re Oriental Bank Corporation* (5) that "The provisions of the Bankruptcy Act, 1883, which take away the priority of the Crown over other creditors in the distribution of assets in bankruptcy, have not, by virtue of the assimilating provisions contained in the Judicature Act, 1875, s. 10, been incorporated in the Companies Act, 1862, so as to bar the prerogative right of the Crown to issue process and thus to obtain payment in full, in priority over other creditors, in respect of a debt due from a company in the course of liquidation under the Companies Act." After that decision came the Preferential Payments in Bankruptcy Act, 1888, which repeated s. 40, sub-s. 4, of the Bankruptcy Act, 1883, and added in the distribution of assets of any company being wound up under the Companies Act of 1862, and thus brought the winding up of companies for certain purposes within the ambit of a rule which had hitherto escaped. The result was that it drew Crown debts within the ambit of the winding up of companies. The Crown is therefore now affected by winding up as it never was before. The reason why s. 10 of the Judicature Act, 1875, did not previously draw in the rules of bankruptcy for the purposes of winding up was because previously the winding-up law did not touch

(1) [1895] 1 Ch. 652, 657.
(2) [1897] 2 Ch. 593, 598.
(3) [1901] 1 Ch. 9, 14.
(4) (1882) 20 Ch. D. 545.
(5) (1884) 28 Ch. D. 643.

the Crown at all. The conclusion to be drawn from all this is that from 1888 onwards Crown debts in liquidation only have priority if they come within the class of certain debts, such as income tax and so on, which are specially mentioned. The legislation is now all brought together in the Companies (Consolidation) Act, 1908, and the argument is as follows: Sect. 209 provides that in winding up there shall be paid in priority certain classes of debts there mentioned, some of which are debts due to the Crown. Then by s. 207, in the winding up of a company the same rules shall prevail with regard to debts provable as are in force for the time being under the law of bankruptcy, and under that law, as now enacted in the Bankruptcy Act, 1914. Further, by s. 186 of the Act of 1908: "The following consequences shall ensue on the voluntary winding up of a company: (1.) The property of the company shall be applied in satisfaction of its liabilities pari passu."

So that we have, (1.) a provision that Crown debts are debts in the winding up; (2.) a provision that certain Crown debts are to have priority over other debts; (3.) a provision that the rules of bankruptcy with regard to debts provable, which have been held to include priority, are to prevail; and (4.) a provision that liabilities are to be discharged pari passu. Therefore on the Act of 1908 the argument of the appellants must succeed.

With regard to the authorities, *In re Henley & Co.* (1) proceeds upon two views, (1.) that the Crown was not bound by the Companies Act, 1862, not being mentioned therein, and (2.) that the Crown had its remedy by writ of extent.

In *In re Galvin* (2) the matter was usefully expounded by Palles C.B. That was a decision upon the Irish Bankruptcy Act, 1872 (35 & 36 Vict. c. 58), which does not contain the words which the English Act of 1883 contains as to debts and liabilities being paid pari passu. It was held that a debt for legacy duty due to the Crown from a bankrupt executor was entitled to priority over the general creditors of the bankrupt. Here we have the same position as was

(1) 9 Ch. D. 469. (2) [1897] 1 I. R. 520.

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dealt with by Palles C.B. with the addition of the pari passu provision.

It is submitted that the authorities are not inconsistent with the argument of the appellants. See also *New South Wales Taxation Commissioners* v. *Palmer* (1), a decision upon the New South Wales Bankruptcy Act, 1898.

The principle which was enunciated by Lords Dunedin and Atkinson in *Attorney-General* v. *De Keyser's Royal Hotel* (2)—namely, that there would be no use in imposing limitations on the Crown if the Crown could at its pleasure disregard them and fall back on prerogative, underlies this case.

Sir Gordon Hewart A.-G. and *Roland Burrows* for the Crown. The judgment of the learned judge below was right. The only question now is whether the Crown is entitled to priority in the payment of this debt. With regard to the authorities which have been cited: *In re Henley & Co.* (3) was decided after the Judicature Act, 1875; *In re Oriental Bank Corporation* (4) followed upon the Bankruptcy Act, 1883; *In re Galvin* (5) was subsequent to the Preferential Payments in Bankruptcy Act, 1888; and the *New South Wales Taxation Commissioners* v. *Palmer* (1) was decided on the eve of the Companies (Consolidation) Act, 1908. At the date of *In re Henley & Co.* (3) the following Acts were in operation: the Companies Act, 1862, the Bankruptcy Act, 1869, and the Judicature Act, 1875. It was there decided that the Crown had priority in a winding up. It may be pointed out that in the bankruptcy of an individual there is a cessio bonorum, the property passing to the trustee, whereas in the case of a company in liquidation that is not so. When *In re Oriental Bank Corporation* (4) was decided the Bankruptcy Act, 1883, was in force, s. 40 of that Act having replaced s. 32 of the Act of 1869, and by s. 150 the Crown was bound to a limited extent. In that case Chitty J. said (6): "It is settled law that on the construction of the Companies Act, 1862, the Crown

(1) [1907] A. C. 179.
(2) [1920] A. C. 508, 526, 539.
(3) 9 Ch. D. 469.
(4) 28 Ch. D. 643.
(5) [1897] 1 I. R. 520.
(6) 28 Ch. D. 647.

is not bound; the Crown not being named, and there being no necessary implication arising from the Act itself by which the Crown's prerogative is affected or taken away." The next stage was in 1897 when the matter came before the Court of Appeal in Ireland in *In re Galvin.* (1) At that time the Preferential Payments in Bankruptcy Act, 1888, was in force. By it s. 40, sub-ss. 1 and 2, of the Act of 1883 were repealed but sub-s. 4 was left in operation, and the rule of s. 40 was extended to winding up.

In re Galvin (1) was a case of bankruptcy and not of liquidation, but the judgment of the Court delivered by Palles C.B. throws much light on the question in this case.

In re Henley & Co. (2) was still cited just before the Companies (Consolidation) Act, 1908. That Act does not alter the law, it is merely a consolidating Act. Sect. 186 replaces s. 32 of the Bankruptcy Act, 1869, s. 207 replaces s. 10 of the Judicature Act, 1875, and s. 209 replaces s. 1 of the Preferential Payments in Bankruptcy Act, 1888. In *New South Wales Taxation Commissioners* v. *Palmer* (3) it was held that, in the administration of a bankrupt's estate under the New South Wales Bankruptcy Act, 1898, the Crown was entitled to preferential payment over all other creditors.

Lord Macnaghten said (4): "As regards authority both in England and Ireland, the highest Courts in the country, short of the House of Lords, have upheld the prerogative of the Crown. The judgment of the Court of Appeal in *In re Henley & Co.* (2) seems to their Lordships, as it did to Simpson J., to be clear upon the point. The decision was rested upon two separate grounds and upon two distinct prerogatives. It was a case of winding up, not of bankruptcy. The property had not passed out of the company. The Court therefore held that the Crown was still at liberty to pursue its extreme rights against the company's property and was on that ground entitled to priority. But the Court also held that under the other and wider prerogative the claim of the Crown must prevail."

(1) [1897] 1 I. R. 520.
(2) 9 Ch. D. 469.
(3) [1907] A. C. 179.
(4) Ibid. 184.

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Great importance is to be attached to that statement. Although in the bankruptcy of an individual the rights of the Crown are cut down, and in liquidation they have been limited, nevertheless the prerogative of the Crown in winding up still remains unimpaired. *Attorney-General* v. *De Keyser's Royal Hotel* (1) is irrelevant for this purpose, except perhaps to a limited extent.

Sir J. Simon K.C. in reply. The case turns upon the correct statement of the principle with regard to the binding of the Crown by statute.

In Professor Maitland's Constitutional History of England, at p. 418, it is stated: "We find that there is often great uncertainty as to the exact limits of the royal prerogative. . . . . Very seldom has any statute expressly taken them" (the powers of the King) "away."

But when a statute invades the field of the prerogative the question is how far does it affect it.

Swinfen Eady M.R. in *In re De Keyser's Royal Hotel* (2) said: "Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative. . . . . Where a matter within the prerogative is provided for by statute, the prerogative is merged in the statute."

And Lord Atkinson in the same case in the House of Lords (3) said much the same thing.

It is obvious that in this case the prerogative of the Crown has been affected by the legislation subsequent to the year 1888 to an extent that entitles the appellant to succeed.

Cur. adv. vult.

1922. April 10. Lord Sterndale M.R. The question in this case is whether in the liquidation of a company called

(1) [1920] A. C. 508. (2) [1919] 2 Ch. 197, 216.
(3) [1920] A. C. 508, 539.

H. J. Webb & Co. the Crown is entitled to be paid an admitted debt of over 9000*l.* in priority to the other creditors of the company, and it raises an important question as to the rights of the Crown to payment of debts due to it from a company in liquidation. I think the expression "debts due to the Crown" is an unfortunate one, for it suggests the exercise of the prerogative of the Crown in circumstances long passed away. The expression suggests the right of the Sovereign to be paid for his own use or for the public use as determined by him sums due to him to the exclusion of the rights of subjects. Formerly these sums would generally be taxes, or something of that kind. At the present time when the departments included under the expression "the Crown" have some of them become, especially during the war, great trading corporations, the prerogative has to be exercised under quite different circumstances and in respect of quite different subject matter. Again the payment in priority of a debt due to the Crown is not now a payment to the Sovereign for his own or public purposes to the exclusion of the subjects, but, as the Attorney-General pointed out, a payment for the benefit of the general body of the taxpayers at the expense of those particular taxpayers who are creditors of the insolvent company. The argument therefore proceeds in an artificia atmosphere which bears little, if any, relation to the actual circumstances.

In this case the debt was in respect of money received by the company for a quantity of frozen rabbits imported by the Food Controller and sold by the Company as his agents. It is difficult to conceive anything more different from the Crown debts in contemplation at the time when the Royal Prerogative took its rise. The case must however be resolved on the ordinary principles applying to the prerogative.

Prima facie, such a debt is admitted to be a debt due to the Crown and so payable in priority to other debts in any circumstances, but the appellant contends that by virtue of various statutes, especially the Judicature Act of 1875, the Bankruptcy Act, 1914, and the Companies (Consolidation) Act, 1908, this right to priority has been lost in

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the case of a company in liquidation. The learned judge held that the case was concluded by the decision in *In re Henley & Co.* (1) in favour of the Crown, and that therefore the Crown was entitled to the priority claimed. When that case was decided the relevant Acts in force in addition to the Judicature Act, 1875, s. 10, were the Bankruptcy Act, 1869, and the Companies Act, 1862. If the provisions of the Acts at present in force are in substance the same as in those Acts I agree that *In re Henley & Co.* (1) is binding upon us and the appeal must fail. It is therefore necessary to inquire whether they are in substance the same. It is better perhaps first to set out s. 10 of the Judicature Act, 1875, so far as it is material: "In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the Law of Bankruptcy with respect to the estates of persons adjudged bankrupt." This section has been held, so far as bankruptcy is concerned, to include the principles applicable to the priorities of debts as well as to their proof and seems to be intended to assimilate the right of creditors of a company in liquidation to those of creditors of a bankrupt individual.

The relevant provisions of the Bankruptcy Act of 1869 are to be found in s. 32: "The debts herein-after mentioned shall be paid in priority to all other debts. Between themselves such debts shall rank equally, and shall be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves; that is to say, (1.) All parochial or other local

(1) 9 Ch. D. 469.

rates due from him at the date of the order of adjudication, and having become due and payable within twelve months next before such time, all assessed taxes, land tax, and property or income tax assessed on him up to the fifth day of April next before the date of the order of adjudication, and not exceeding in the whole one year's assessment." Then follows a provision as to certain wages and salaries. "Save as aforesaid, all debts provable under the bankruptcy shall be paid pari passu." In the Companies Act, 1862, the material section is 133: "The following consequences shall ensue upon the voluntary winding up of a Company." The present winding up is voluntary. "The property of the company shall be applied in satisfaction of its liabilities pari passu, and subject thereto, shall unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the Company."

In this state of legislation the question whether Crown debts were entitled to priority came before Malins V.-C. and the Court of Appeal in *In re Henley & Co.* (1). Malins V.-C. held that the Crown was not entitled to priority, but his decision was reversed by the Court of Appeal. As I read the case the decision proceeded entirely upon the Companies Act of 1862 and mainly upon s. 133. The Court held that the Act of 1862 nowhere mentioned the Crown and therefore the Crown rights could not be affected, and it is to be noticed that the Act of 1862 nowhere dealt with the proof of Crown debts at all. The whole legislation of that Act was confined to ordinary debts between subjects, and there was no ground for applying the provision of s. 133 that all liabilities should be paid pari passu to anything but such debts. The Court does not seem to have considered that the effect of s. 10 of the Judicature Act, 1875, was to introduce into the Companies Act of 1862 the provisions of s. 32 of the Bankruptcy Act, 1869, and the explanation may be that Sir George Jessel, the Master of the Rolls, had held in *In re Albion Steel & Wire Co.* (2) that those provisions so far as related to local rates

(1) 9 Ch. D. 469. (2) (1878) 7 Ch. D. 547.

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were not by s. 10 introduced into the winding up of companies and that case had been cited without question in argument. But, whatever the reason, the important point is that the case was decided on the Companies Act, 1862, alone and not on the assumption that s. 10 introduced s. 32 of the Bankruptcy Act, 1869, into the Companies Act, 1862. The Legislature also, in passing the Companies Act, 1883, does not seem to have considered that the provisions of s. 10 had been introduced into liquidations, for it expressly introduced some of them in s. 4 of that Act. This would have been unnecessary if they had already been introduced by s. 10.

I think it was on that footing that the decision was approved by the Irish Court of Appeal in *In re Galvin* (1) and in *New South Wales Taxation Commissioners* v. *Palmer* (2), in each of which cases the Court was clearly dealing with an Act which contained no provisions at all concerning and no reference to the Crown and was therefore subject to the same conditions as the Companies Act, 1862.

It is now, I think, necessary to consider the legislation as to bankruptcy and winding up subsequent to the decision in *In re Henley & Co.* (3) The Bankruptcy Act, 1883, in ss. 40 and 150 provided as follows; s. 40 says: "In the distribution of the property of a bankrupt there shall be paid in priority to all other debts:—(*a*) All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before such time, and all assessed taxes, land tax, property or income tax, assessed on him up to the fifth day of April next before the date of the receiving order, and not exceeding in the whole one year's assessment"; and then certain wages and salaries are specified: "(2.) The foregoing debts shall rank equally between themselves, and shall be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves. (3.) In the case of partners the joint estate shall be applicable in the first

(1) [1897] 1 I. R. 520. (2) [1907] A. C. 179.
(3) 9 Ch. D. 469.

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instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate. (4.) Subject to the provisions of this Act all debts proved in the bankruptcy shall be paid pari passu." Then s. 150 enacts: "Save as herein provided the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the Crown." By the combined effect of these provisions added to the fact that in bankruptcy there is a cessio bonorum the matter is concluded and it is clear that the Crown can claim no priority (see the reasoning of Palles C.B. in *In re Galvin* (1)). The provisions of the present Bankruptcy Act, 1914, are for this purpose identical with those of the Act of 1883.

The relevant Acts relating to liquidation are the Companies Act of 1883, the Preferential Payments in Bankruptcy Act, 1888, and the Companies (Consolidation) Act, 1908. By the Act of 1883, s. 4, a priority was given to some debts such as was given by s. 32 of the Bankruptcy Act, 1869, but that provision was confined entirely to wages and salaries and no mention was made of the Crown or Crown debts. For the purposes of this case, therefore, that Act is in the same position as the Companies Act of 1862 and the decision in *In re Henley & Co.* (2) would equally apply to it. The Preferential Payments in Bankruptcy Act of 1888 put the matter on a different footing. The first section is as follows: "In the distribution of the property of a bankrupt, and in the distribution of the assets of any company being wound up under the Companies Act, 1862, and the Acts amending the same, there shall be paid in priority to all other debts—(*a*) All parochial or other local rates due from the bankrupt or the

(1) [1897] 1 I. R. 520. (2) 9 Ch. D. 469.

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company at the date of the receiving order or, as the case may be, the commencement of the winding-up, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax assessed on the bankrupt or the company up to the fifth day of April next before the date of the receiving order, or, as the case may be, the commencement of the winding up, and not exceeding in the whole one year's assessment." Then certain wages and salaries are mentioned, and sub-s. 2 is: "The foregoing debts shall rank equally between themselves and shall be paid in full, unless the property of the bankrupt is, or the assets of the Company are, insufficient to meet them, in which case they shall abate in equal proportions between themselves." The Companies Act, 1908, included, in ss. 186, 207 and 209, the provisions of s. 133 of the Companies Act, 1862, s. 10 of the Judicature Act, 1875, and s. 1 of the Preferential Payments in Bankruptcy Act, 1888. I agree with what was said during the argument to the effect that these provisions acquire no additional force by being collected in one Act instead of being contained in several. It is to be noticed that there is no provision in this Act corresponding to s. 150 of the Bankruptcy Act, 1883 (Bankruptcy Act of 1914, s. 151), and no provision corresponding to the Bankruptcy Act, 1883, s. 40, sub-s. 7 (Bankruptcy Act, 1914, s. 33, sub-s. 7), unless it is to be found in s. 207. I do not know why there are no provisions corresponding to s. 150 of the Bankruptcy Act, 1883, which would have put the question in this case beyond a doubt, but I have to consider whether without it there is enough in the Act to show that the prerogative of the Crown as to priority of debts is taken away. I think that *In re Henley & Co.* (1) ceased to be directly applicable to the case of a winding up after the Preferential Payments in Bankruptcy Act of 1888. As I have pointed out, that case did not proceed on the assumption that s. 10 of the Judicature Act, 1875, imported into a winding up the provisions of s. 32 of the Bankruptcy Act, 1869, but on the footing that there was no reference to the Crown in

(1) 9 Ch. D. 469.

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the Companies Act, 1862, and therefore, in a proceeding under that Act, the prerogatives of the Crown were untouched, and the cases in which it has been approved have been cases decided on that footing. In *In re Galvin* (1) the Court was dealing with an Irish Bankruptcy Act which contained no reference to the Crown; in the *New South Wales Taxation Commissioners* v. *Palmer* (2) with a Colonial Bankruptcy Act which also had no reference to the Crown (see per Lord Macnaghten (3)); and *In re Oriental Bank Corporation* (4) which was decided in 1883 upon the Companies Act, 1862, before the passing of the Preferential Payments in Bankruptcy Act, 1888. That last Act seems to me to have changed the position of matters so far as regards winding up. By s. 1 it introduced for the first time into the winding up of a company provisions as to Crown debts. It gave priority to certain Crown debts on an equal footing with other Crown debts, for example wages, salaries and local rates, and therefore it could no longer be said that the Crown was not mentioned in the enactments relating to winding up which I have shown to be the ground of the decision in *In re Henley & Co.* (5) The effect of the alteration, and of the provision as to the priority of certain Crown debts is the question, and the difficult question, which we have to consider.

It will be well at the outset to see which is or are the prerogative or prerogatives which the Crown asserts. It is stated by Lord Macnaghten in *New South Wales Taxation Commissioners* v. *Palmer* (6) that there are two distinct prerogatives, first a narrower one consisting of the right of the Crown, as the property had not passed out of the company, to pursue its extreme rights by writ of extent or otherwise to take the assets of the company apart altogether from the winding up, and, secondly, a wider prerogative arising in the distribution of assets in a winding up, that wherever the rights of the Crown and the rights of a subject to a debt of equal degree come into competition, the Crown's

(1) [1897] 1 I. R. 520.
(2) [1907] A. C. 179.
(3) Ibid. 183.
(4) 28 Ch. D. 643.
(5) 9 Ch. D. 469.
(6) [1907] A. C. 179, 184.

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right prevails. I should myself have been inclined to consider them not two distinct prerogatives but two different methods of asserting the same prerogative, that is to say the right to be paid in priority to any one else. But I do not feel myself justified in taking a different view from that of Lord Macnaghten founded on the judgments of James, Brett and Cotton L.JJ. in *In re Henley & Co.* (1) and in accordance with that of Chitty J. in *In re Oriental Bank Corporation.* (2) I shall therefore deal with them as two prerogatives, and I propose to deal with the second, or as it is called, the wider prerogative, first.

In s. 209 of the Companies (Consolidation) Act, 1908, a modified priority only is given to certain Crown debts, but I agree that a limitation of the prerogative as to certain debts does not of itself necessarily import a limitation as to all Crown debts. I think, however, that when s. 209 is considered with the other provisions of the Act such a limitation does exist. For this purpose I think s. 186 is the only section which it is necessary to consider. That section is an exact reproduction of s. 133 of the Companies Act, 1862, which was held in *In re Henley & Co.* (1) not to apply to the Crown. Its reproduction as it stands must be due to careless drafting, for it is in direct contradiction to s. 209, which provides in effect that the property of the company shall not be applied in satisfaction of all its liabilities pari passu but that some of them shall have priority. It follows, I think, that s. 186 must be read as prefaced by some such words as "Subject to the provisions of this Act" or "Subject to the provisions of section 209 of this Act," and when so read I think the matter is reasonably clear. Sect. 209 gives priority to the debts there mentioned over other debts, and it is admitted that "other debts" includes Crown debts. When s. 186 is read as subject to this provision it seems to me that its liabilities must include liabilities to the Crown, for the section is dealing with the payment of liabilities subject to s. 209, and debts and liabilities in the two sections must have the same meaning.

(1) 9 Ch. D. 469. (2) 28 Ch. D. 643.

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The result is this: that s. 186 so read has the same effect as s. 33, sub-s. 7, of the Bankruptcy Act, 1914, and the exercise of the wider prerogative which would give Crown debts other than those mentioned in s. 209 a priority over every other debt including those mentioned in s. 209 is inconsistent with the legislation contained in the Act. I think, therefore, that so far as the wider prerogative is concerned it is negatived by the express provisions of the Act.

The so-called narrower prerogative raises, I think, a more difficult question. This prerogative consists of the right of the Crown, disregarding the liquidation altogether, to exercise its remedies by writ of extent or otherwise and so to take the assets of the company in satisfaction of its debts. This is impossible in bankruptcy by reason of the cessio bonorum which takes place and the effect of s. 151 of the Bankruptcy Act, 1914; but it was contended that such a right can be asserted against the property of a company in liquidation, because it remains the property of the company and does not vest in the liquidator. This I think is correct unless the exercise of such a prerogative is inconsistent with legislation by which the Crown is affected. The appellants contended that the prerogative was excluded by s. 207 which had the effect of introducing into winding-up proceedings the provisions of bankruptcy and amongst them s. 151. I do not think this is so. Sect. 207 is a reproduction of the Judicature Act, 1875, s. 10, and that section was never held to have such an effect. But I think that the exercise of such a prerogative is inconsistent with the provisions of the Companies Act, 1908. Chitty J. in *In re The Oriental Bank Corporation* (1) held that such a prerogative could be exercised, the effect being that there remained for distribution in the winding up only such assets as were not absorbed in satisfying the Crown, and that such assets were the only subject of legislation. But the learned judge was there dealing with a winding up in which Crown debts were in no way involved, and I think the matter now stands on quite a different footing. The Companies (Consolidation)

(1) 28 Ch. D. 643.

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Act, 1908, deals with Crown debts as well as private debts and gives a priority in the distribution of the assets of a company in liquidation to certain debts, including some Crown debts, over all other debts including those due to the Crown, and it seems to me entirely inconsistent for the Crown to assent to this Act, and still to claim the right to take so much of those assets (in some cases probably the whole) as is necessary to satisfy all liabilities due to the Crown. The effect is to give or preserve to all Crown debts, at any rate except those mentioned in the Act, a priority which overrides the right against the assets given by the Act. It is true that this priority is asserted not in the winding-up proceedings, but apart from and independently of them, but it seems to me to be subversive of the distribution of the assets which the Crown has prescribed in the Act for creditors of the company including itself.

I come to this conclusion apart from authority, but I think it is in accordance with the principles laid down in *Attorney-General* v. *De Keyser's Royal Hotel* (1) especially by Lord Atkinson. I think this is the proper conclusion dealing with the case as concerned with the two prerogatives. It would in my opinion be even clearer if I were at liberty, which I am not, to follow my own opinion that there are not two prerogatives, but only two methods of asserting the same prerogative.

The appeal must be allowed.

Warrington L.J. The question in this case is whether the Crown, to whom the company is indebted in respect of a debt, not being a debt for which priority is specifically given by s. 209 of the Companies (Consolidation) Act, 1908, is entitled to be paid in priority. P. O. Lawrence J. has decided that the Crown is so entitled.

The debt arose in the course of certain commercial transactions conducted on behalf of the Crown by the Ministry of Food; the debt is admitted, and it is also admitted in this Court that the debt is a Crown debt.

(1) [1920] A.C. 539.

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The company is in voluntary liquidation, which commenced on July 9, 1920. On February 3, 1921, a summons was issued by the Food Controller on behalf of the Crown claiming priority for the debt in question, and on June 14, 1921, the order appealed from was made. It ordered that the debt be paid out of the assets of the company in priority to the claims of all other creditors of the company.

Two distinct prerogatives are relied upon by the Crown. First, that under which it is entitled by certain summary proceedings, for example, by the issue of a writ of extent, to seize and realize the lands, goods and choses in action of its debtor in satisfaction of its debt; and, secondly, that under which it is entitled to be paid in priority to all other creditors with whom it comes into competition. The contention on the part of the liquidator is that both these prerogatives have been superseded by statute—namely, the Companies (Consolidation) Act, 1908, and that since that Act, at all events, in the administration of the assets of a company being wound up either voluntarily or by the Court, the Crown is entitled to the priority given to certain Crown debts by s. 209, and to no further or other priority.

The questions are: (1.) whether the Crown is affected at all by the provisions of the Act, and (2.) if so, to what extent is it affected.

It is, I think, clear that the Crown's prerogatives may be affected by the provisions of a statute without express words if that result follows by necessary implication. Moreover, when once it is decided that the prerogatives of the Crown are affected, then the question as to the extent to which they are affected becomes one of construction simply. The following short passage from the judgment of Swinfen Eady M.R. in *De Keyser's Royal Hotel* v. *The King* (1), quoted with approval by Lord Atkinson in *Attorney-General* v. *De Keyser's Royal Hotel* (2), though dealing with a different subject matter expresses the principle which ought to be applied in the present case. The learned Master of the Rolls says: "Where Parliament has intervened and

(1) [1919] 2 Ch. 197. (2) [1920] A. C. 508, 538.

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has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised." The question is, has Parliament intervened and enacted such provisions in reference to the distribution of the assets of a company in liquidation as to supersede the prerogatives above mentioned or one of them ?

It is not disputed, and cannot be disputed in this Court, that the Companies Act, 1862, did not have that effect as to either prerogative : see *In re Henley & Co.* (1)

It was further decided in *In re Oriental Bank Corporation* (2) that s. 10 of the Judicature Act, 1875, importing into the winding up of companies the rules of bankruptcy as to debts provable, and so forth, had not superseded the first of the two prerogatives. Whether it had any such effect on the second was left undecided. The possible effect of this section was not dealt with in the judgment in *In re Henley & Co.* (1), though that case was decided in 1878.

So matters rested until 1888, when the Preferential Payments in Bankruptcy Act of that year was passed. This Act contained the following material provisions. [His Lordship read s. 1 of that Act and continued :] That is to say, certain specified Crown debts of a strictly limited class are given, in common with some other debts not Crown debts, an absolute right to payment in full out of the assets if they be sufficient, and in priority to all other debts. I do not discuss the effect of this statute, inasmuch as regards companies it is not now in force, having been superseded by the Companies (Consolidation) Act, 1908, and there has been no decision upon it in England affecting the question before us.

This question turns, as I have said, on the effect of the Companies (Consolidation) Act, 1908. It is important to bear in mind that under this Act, as under the Act of 1862, winding up, whether voluntary or by the Court, does not effect a cessio bonorum, as does a bankruptcy, but the company's property remains vested in it as before. The present case is

(1) 9 Ch. D. 469. (2) 28 Ch. D. 643.

that of a voluntary winding up. [His Lordship then read ss. 186 and 207 of the Act of 1908 and continued:] This takes the place of s. 10 of the Judicature Act, 1875, which is repealed so far as companies are concerned. Sect. 209, so far as it is material, is as follows. [His Lordship read the section and continued:] By this Act ss. 1, 2 and 3 of the Preferential Payments in Bankruptcy Act, 1888, are repealed so far as they relate to companies. There is in the Act no express mention of the Crown, nor, except in s. 209, of Crown debts. But the effect of s. 209 is to give to certain Crown debts in common with the other debts of the particular classes there mentioned the right to be paid in priority to all other debts and to be paid in full unless the assets are insufficient to meet them. In my opinion this provision does supersede both the prerogatives above referred to. First as to what is called by Lord Macnaghten in *New South Wales Taxation Commissioners* v. *Palmer* (1) the wider prerogative—namely, that to have a preference in administration over the debts of a subject in competition with Crown debts: if this prerogative could be asserted by the Crown, it would bring about a state of things wholly inconsistent with the provisions of s. 209, and in particular those which give a statutory priority of a qualified nature to the specified Crown debts only. It seems to me that the Crown has, by assenting to a statute which associates certain debts due to subjects with certain debts due to itself and gives to such associated debts priority over all other debts, precluded itself from asserting a prerogative right the exercise of which would prevent the carrying into effect of the course of administration to which it has so assented.

I think also for much the same reasons the exercise of the other prerogative—namely, that of seizing assets of the company and causing them to be realized and the proceeds to be applied in payment of Crown debts—is also superseded by the statute. The provisions of s. 209, sub-s. 2 (*a*), as to payment of the specified Crown debts with the associated debts in full unless the assets are insufficient cannot have effect given

(1) [1907] A. C. 179.

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to them if the Crown is still at liberty to take those assets and have them applied in payment of its other debts.

The extraordinary result might follow that debts to the Crown, to which it was obviously intended to give a special or qualified priority, would not get paid until other Crown debts, for example, debts due for income tax, beyond the one year's assessment, had been paid.

The only remaining question is whether there is any authority which binds this Court to decide contrary to the opinion I have expressed. *In re Henley & Co.* (1) and *In re Oriental Bank Corporation* (2) dealt with a different Act not containing the provisions which are said to supersede the prerogatives. The learned judge in the present case seems to me, with all respect to him, not to have appreciated the effect on the judgments in *In re Henley & Co.* (1) of s. 209 of the Act of 1908, and I think he is wrong in regarding that as a binding authority on the construction and effect of the last-mentioned Act. It is true also that Buckley L.J. in the last edition of his book on companies, p. 424, in his notes on s. 186 says that the Crown still retains its priority, but he does not deal with the considerations founded on s. 209.

The decision which requires most consideration, though it is not binding on this Court, is *In re Galvin* (3), a decision of the Irish Court of Appeal. That case arose in Bankruptcy and the point of the decision was that under the Irish Bankruptcy Act, which gave special priority to certain Crown debts, as did the Preferential Payments in Bankruptcy Act, 1888, other Crown debts, though postponed to these special debts, were entitled to priority over the general debts. The case is, however, in my opinion distinguishable from the present; it was decided under a different Act, namely the Irish Bankruptcy Act, and that Act did not contain a provision similar to s. 186 of the Act of 1908, that the assets are to be applied in discharge of its liabilities pari passu. If I am right, the statute overrides the prerogative and the Crown is bound by the whole and not by any particular part

(1) 9 Ch. D. 469. (2) 28 Ch. D. 643.
(3) [1897] 1 I. R. 520.

alone. Consequently, subject to the special priority, and after discharging the debts entitled thereto all debts, those owing to the Crown as well as others, must be discharged pari passu. Sect. 186 must be read as if it were expressed to be "Subject to the provisions as to priority hereinafter contained."

On the whole I think the appeal succeeds.

The Order of the Court below will be varied by directing that the debt in question be not paid in priority. As to costs, the question was a fair one to raise in the Court below, and the order of that Court as to costs may stand, but the Food Controller must pay the costs of the Liquidator of the appeal as between party and party, the difference between those costs and his costs as between solicitor and client being paid out of the assets. Costs may be set off if necessary.

Younger L.J. The claim of the Crown in this liquidation to rank in priority to all the creditors of the company for its admitted debt of 9689*l.* 5*s.* 10*d.* has been upheld by the learned judge on the short ground that any question about it was definitely concluded in favour of the Crown by the decision in *In re Henley & Co.* (1) which was binding upon him. In later passages of his judgment the learned judge gives his reasons for so holding. In effect they were that the Lords Justices deciding *In re Henley & Co.* (1) in 1878, after s. 10 of the Judicature Act, 1875, had become law, expounded in their judgments the priorities of the Crown in relation to its claim against that company with that section fully in their view: that Palles C.B. in 1897 in *In re Galvin* (2) and Lord Macnaghten in 1907 in *New South Wales Taxation Commissioners* v. *Palmer* (3) each of them treated *In re Henley & Co.* (1) as still—that is in 1897 and 1907 respectively—accurately stating the Crown's position in similar circumstances; and lastly that the fact that the statutes in force both in 1897 and 1907, when these opinions were expressed, had since been and were now grouped together in the Companies (Consolidation) Act, 1908, did not justify him in attributing to

(1) 9 Ch. D. 469. (2) [1897] 1 I. R. 533.
(3) [1907] A. C. 184.

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them, in that form, a wider effect than had been attributed to them when separately existing. *In re Henley & Co.* (1) accordingly in its totality still governed and established the present claim of the Crown. It is obvious from this that the whole basis of that judgment disappears if once it be shown that the learned judge was mistaken in the view he expressed that the Lords Justices decided *In re Henley & Co.* (1) on the footing that s. 10 had been effective to introduce into the Companies Act, 1862, under which the Henley liquidation was proceeding, the appropriate section of the Bankruptcy Act then in force, to wit, s. 32 of the Act of 1869. And it is, as it seems to me, capable of demonstration that the Court of Appeal in *In re Henley & Co.* (1) did ignore entirely the existence of that section. The decision, says Chitty J. in *In re Oriental Bank Corporation* (2), expounded "the state of the law when the 10th section of the Judicature Act, 1875, came into operation." And in the passages of his judgment immediately following Chitty J. makes it clear that the law so expounded was the law as it stood, not after, but before s. 10 of the Judicature Act, 1875, became effective. And this statement is, I think, undoubtedly in substance correct. It is true that *In re Henley & Co.* (1) was decided not before but after s. 10 came into operation—decided, indeed, in a liquidation which had commenced after April 6, 1877. (3) But it is also true that it was argued and decided as a case governed by the Companies Act, 1862, alone, and with no reference whatever to s. 10. It was not there contended by anybody that that section at all affected the question in debate. The decision of Malins V.-C. excluding the Crown's claim to priority and the decision of the Court of Appeal recognizing it were equally based on a consideration of the Companies Act, 1862, unamended—that is as a statute which in no sense named or bound the Crown. Nor can there, I think, be any question that in each Court the decision, opposed though the one was to the other, would have remained quite unaltered had the question there arisen before and not after s. 10 became law.

(1) 9 Ch. D. 469. (2) 28 Ch. D. 643, 648. (3) See 38 L. T. 742.

That in the Court of Appeal the section was entirely disregarded—plain enough on a mere reading of the judgments—is really shown conclusively by one consideration—namely, that had the Lords Justices treated s. 10 as having by its reference to then existing Bankruptcy legislation introduced into the Companies Act, 1862, the provisions of s. 32 of the Bankruptcy Act, 1869, or any provision with any such effect as that which must now admittedly be attributed to s. 209 of the Companies (Consolidation) Act, 1908, they could not have expounded both of the prerogative rights of the Crown which were then held to exist in the unqualified terms of priority in which they were both there expounded.

It is important, in more aspects than one of the present case, to ascertain how all this came about. Sir John Simon found the explanation, as I understood his argument, in the view that it was not permissible for a Court, on mere referential words, to incorporate into a statute, which in a liquidation under it had to do only with the satisfaction of claims of private persons, provisions from another statute having the effect of binding the Crown. He relied strongly upon three cases, *In re Leng* (1), *In re Heywood* (2), and *In re Whitaker* (3), all decided many years after *In re Henley & Co.* (4), cases which dealt with the effect of s. 10 in introducing the rules of Bankruptcy into the administration of the insolvent estates of deceased persons, and in each of which it was in effect held (see *In re Leng* (5)), that these rules in Bankruptcy "as to debts and liabilities provable include all rules as to priorities expressly enacted by any statute and made applicable in the event of bankruptcy." On that construction of s. 10 as so applied Sir John Simon contended that it could only be for the reason he had suggested that effect was not given to it in *In re Henley & Co.* (4) For myself I cannot accept that solution of the difficulty. I can see no difference in principle between the introduction into a statute by apt referential words of

(1) [1895] 1 Ch. 652.
(2) [1897] 2 Ch. 593.
(3) [1901] 1 Ch. 9.
(4) 9 Ch. D. 469.
(5) [1895] 1 Ch. 652, 657.

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provisions in another relating to the priorities of King's taxes and the introduction into it of provisions relating to the priorities of rates or anything else. To this extent I agree with Malins V.-C. in *In re Regent United Service Stores* (1), and I would point out also that Chitty J. in *In re Oriental Bank Corporation* (2) was prepared to hold, and, although he did not expressly so decide, he dealt with the case before him on the assumption that the provisions as to King's taxes contained in the Bankruptcy Act, 1869, s. 32, had by virtue of s. 10 of the Judicature Act, 1875, in fact been made applicable in the liquidation of companies.

In my judgment, therefore, the explanation of the disregard of that section in *In re Henley & Co.* (3) must be found elsewhere; and an examination of the different reports of the case shows, I think, very clearly where it lies. It lies in this, that counsel were not there on either side prepared to challenge the correctness of Sir George Jessel's explanation of the section given in *In re Albion Steel and Wire Co.* (4), a case cited in both Courts by counsel for the Crown and not challenged in either Court by counsel for the liquidator. There Sir George Jessel shortly before had held that the priority provisions of s. 32 of the Bankruptcy Act, 1869, with reference to local rates had not by virtue of s. 10 become applicable to the case of a company in liquidation; in other words, that none of the priority provisions of that section were by s. 10 made applicable to companies. And in view of the later judicial history of the section in its effect as to priorities upon the administration of the insolvent estates of deceased individuals—I refer, of course, to *In re Leng* (5), *In re Heywood* (6) and *In re Whitaker* (7)—it is remarkable that this view of it in relation to companies was not only the view of Sir George Jessel; it was also the view of the Legislature. This is made very apparent by the Companies Act, 1883—an Act to amend the Companies Act,

(1) (1878) 38 L. T. 130.
(2) 28 Ch. D. 643.
(3) 9 Ch. D. 469.
(4) 7 Ch. D. 547.
(5) [1895] 1 Ch. 652.
(6) [1897] 2 Ch. 593.
(7) [1901] 1 Ch. 9.

1862—by s. 4 of which the then existing bankruptcy priority provisions expressed in the very terms of s. 32 of the Bankruptcy Act, 1869—but strictly confined to these provisions with reference to wages and salaries—were then in 1883 made applicable in the liquidation of a company's assets.

It seems plain from the terms of that statute that there was no idea in the mind of the draftsman that this priority had already been conferred before—that is, by s. 10 of the Act of 1875—a conclusion further confirmed by the fact that the bankruptcy position not only of taxes but even of rates was still left by the Act entirely untouched. It was not until 1888 that by the Preferential Payments in Bankruptcy Act of that year, which itself repealed the Companies Act, 1883, all the provisions in bankruptcy with reference to the priorities of wages and salaries, rates and taxes were in identical terms made expressly applicable in the distribution both of the property of a bankrupt and of the assets of a company. Thereby, and in its view, for the first time, as I read the statutes, the Legislature achieved that result.

Enough has now, I think, been said to justify the statement that in *In re Henley & Co.* (1) the Court of Appeal ignored altogether the existence, for any then effective purpose, of s. 10 of the Judicature Act, 1875. And it is, I think, equally clear that both Palles C.B. and Lord Macnaghten in the cases to which the learned judge refers were also, like Chitty J., regarding it as a decision based upon, and applicable only to, a liquidation proceeding under the Companies Act, 1862, unamended. Nothing, as it appears to me, could have been further from the mind of Palles C.B. in an Irish bankruptcy case, or of Lord Macnaghten in a colonial appeal, than to express any opinion at all upon the continued effect of *In re Henley & Co.* (1) in the liquidation of companies governed by English statutory enactments subsequent to the Act of 1862 and in no way brought under notice. Nor, in my judgment, did either of them do so.

I am accordingly quite unable to accept the view of the learned judge that the Crown's claim to priority here is

(1) 9 Ch. D. 469.

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definitely concluded in its favour by *In re Henley & Co.* (1) If that claim is to be made good, it must be justified in some other way. But I must not be supposed to suggest that *In re Henley & Co.* (1) is not an authority of the first importance on the present appeal. On the contrary, unless there is kept constantly in view the possible existence, not of both concurrently, but of each separately, of the two prerogatives or privileges of the Crown there so distinctly enunciated, it is more than difficult in the present case to avoid confusion if not error. The relevant authorities to which reference must be made relate not only to the liquidation of companies but to the bankruptcy of individuals. *In re Henley & Co.* (1) enables us to keep clearly in mind the essential difference in respect of the matter now in hand between the two, and prevents us from accepting without more a conclusion reached in bankruptcy as one necessarily applicable to liquidation. That case remains the foundation, if it is no longer the conclusion, of the whole matter.

In *In re Henley & Co.* (1) two prerogatives of the Crown were brought into question. One was the prerogative described by Lord Macnaghten in *New South Wales Taxation Commissioners* v. *Palmer* (2), as "the wider prerogative" —namely, that in the administration of a company's assets under a statute which did not bind the Crown, "whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition the Crown's right prevails." The second prerogative, exercisable only because the property had not by the liquidation passed out of the ownership of the company—this is very important—was the privilege of the Crown to pursue its extreme rights against the company's property for the amount of its debt, notwithstanding the winding up. In *In re Henley & Co.* (1) it was held that by the Companies Act, 1862—and for the reason that that Act did not bind the Crown—neither of these prerogatives was in a liquidation under that Act taken away.

The effect of the decision is very clearly explained by

(1) 9 Ch. D. 469. (2) [1907] A. C. 179.

Chitty J. in *In re Oriental Bank Corporation* (1) in the course of his judgment already referred to: "The fund to be administered would" he says, "consist, by virtue of the decision in *In re Henley & Co.* (2), of the whole of the assets of the company, if the Crown came in under the liquidation, and sought to prove, and the Crown would then retain its right of priority as against the other creditors. But if the Crown stood out and insisted on its prerogative, then the assets to be administered would be the assets of the company, less that portion of the assets which the Crown had taken away." Here we have clearly indicated the marked distinction, in this matter of the Crown's priority, between its original rights in the bankruptcy of an individual and its original rights in the liquidation of a company. Bankruptcy when duly constituted involves a cessio bonorum. Liquidation of a company does not. Notwithstanding liquidation a company's property remains vested in itself. In the case of bankruptcy the second prerogative right above described is of no advantage to the Crown. Any remedy by extent, execution or distress ceases to be available against the bankrupt's property so soon as it is vested in the trustee. In a bankruptcy accordingly when fully constituted the only effective prerogative is Lord Macnaghten's wider prerogative. If that be effectively barred—and ever since the Bankruptcy Act, 1869, it has been so barred (see *In re Galvin* (3))—there is no further prerogative to preserve. The conjoint effect of *In re Galvin* (3) and *In re Bonham* (4) is, I think, clearly to show that the only innovation upon previous legislation made by s. 150 of the Bankruptcy Act, 1883—so far as that section enacted that the provisions of the Act relating to the remedies against the property of a debtor and the priorities of debts should bind the Crown—was to protect the debtor's property from effective priority action on the part of the Crown during the period of relation back. This point will later on be shown to be not without significance here.

(1) 28 Ch. D. 643, 648.
(2) 9 Ch. D. 469.
(3) [1897] 1 I. R. 533.
(4) (1879) 10 Ch. D. 595.

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This immunity of a bankrupt's property from outside process by the Crown after the bankruptcy had been fully constituted was not, however, as has been seen, shared by a company in liquidation, at any rate, under the Act of 1862. In such a case, the circumstances being that the wider prerogative also still subsisted, the Court was bound to allow the Crown to proceed with its outside remedies, notwithstanding the winding up: see *In re Henley & Co.* (1) All of which goes to show that in the case of a company in liquidation as contrasted with the bankruptcy of an individual it must even now in some way be shown that both of the Crown's prerogatives have ceased to be exercisable before it can be concluded that the Crown has been finally deprived of its priority. Putting it otherwise, we now see the reason why under the Bankruptcy Act, 1869, the prerogative of the Crown was effectually lost against a bankrupt's property as it existed on adjudication, although only the wider prerogative was under that statute shown to be barred; and why merely to show as much in the case of a company is by no means necessarily sufficient to attain the same result.

And this brings us face to face with the real problem that arises upon this appeal. In *In re Henley & Co.* (1) both prerogatives were held to co-exist; neither had been taken away either expressly or by implication. All that was under the Companies Act of 1862. Now we have to do with the Companies (Consolidation) Act, 1908, with, as part of it, s. 209, reinforced possibly by other provisions for which no counterpart is to be found in the Act of 1862, and the effect of which is certainly profoundly to modify, it may be, as I hope to show, entirely to extinguish the wider prerogative. And the great question will be whether that result is compatible with the retention by the Crown of its second prerogative right at all.

I propose now to embark upon that inquiry, confining myself in the first instance to the consideration of the question whether the "wider prerogative" is under this Act of 1908 merely modified or whether it is not altogether

(1) 9 Ch. D. 469.

extinguished. The section of the Act mainly in point is s. 209. Sects. 207, 186 and 107 are, however, not without some bearing on the result. The effect of s. 209 is up to a point not in dispute. It was agreed by the Attorney-General that "all the other debts" in priority to which the debts enumerated in that section are to be paid include Crown debts. To these enumerated debts there is given what may be called an associated preference, and amongst them are included Crown debts represented by assessed taxes, land tax, property or income tax, for, putting it shortly, no longer than the last complete fiscal year of a company's pre-liquidation existence. It is to be noticed that all the other debts in the associated preference, in so far as they are excluded from preference, are all ordinary unsecured liabilities of the company, and will fall to be satisfied accordingly. It is to be noticed also that amongst the assets of the company set apart to meet these associated preferential debts is, under sub-s. 2 (*b*), property subject to a floating charge, with, under sub-s. 4, the proceeds of a distress, neither of which could, apart from these respective sub-sections, have been reached under either the wider or the second prerogative of the Crown above described. In this connection also it may be observed that this statute by s. 107, sub-s. 1, when the company is not in liquidation, provides for the satisfaction of these associated debts a fund which again could not be reached under either prerogative. It is, moreover, worth noting that by the National Insurance Act, 1911, s. 110, certain defined contributions payable by a company under that Act in respect of employed contributors and workmen are now included amongst these associated preferential debts in a liquidation.

Now there is and can be no question that all these associated debts with an area appropriated for their payment in which no other unsecured debt has part or lot come, in ranking, absolutely first. But even if the Crown debt in this case had been one of the Crown debts enumerated in the section and had been payable in respect of the prescribed period, the section even then would not have

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justified the declaration of the learned judge. For the priority even of these Crown debts is not, as has here been declared by him, exclusive. It is an associated priority only. The present Crown debt, however, is not one of those enumerated in the section at all; and the question with regard to it, as to any other Crown debts, including assessed taxes, land tax and property and income tax payable outside the year of preference, is whether, along with the rates, wages, salaries, compensation and contributions not entitled to the associated preference, it is relegated to the status of an ordinary unsecured debt of the company, as in bankruptcy, or whether it is, in respect of ranking, interposed in a position of postponed preference after the associated preferential debts but before the company's general unsecured debts, including therein these excluded rates, wages, salaries, compensation and contributions—whether, in other words, it is placed in the position in which it would have been placed by Palles C.B. in *In re Galvin* (1) under a somewhat similar but not identical clause in the Irish Bankruptcy Act.

Now but for that authority—and the judgment is of course one of the very highest authority—I should myself on the construction of s. 209 alone have had little doubt that the first of these alternative views is the correct one. The terms of that section lead me to the conclusion that the subject of the Crown's priorities is in a liquidation exhaustively dealt with by it, so that the Crown can claim no priority except what is allowed by its expressed terms. Its result is to give an associated preference to debts specified and to reserve no preference for any others; its effect is exhaustive and complete. While it operates to restrict the Crown's privileges in two directions—in the extent and in the exclusiveness of its priority—it extends these privileges in a third—in the area of contribution to the debt. In short the section does not amount to any unqualified surrender by the Crown. So far as it works a surrender at all it accompanies it with compensation. It is thus in effect a

(1) [1897] 1 I. R. 520.

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compromise in the full sense of the word. Moreover it is, I think, difficult to read the section without seeing—it is perhaps even more difficult to read s. 1 of the Preferential Payments in Bankruptcy Act, 1888, from which it is taken, and in which the bankruptcy provisions are associated with the company provisions in the same sub-sections without being satisfied—that as the favoured Crown debts are associated in preference with the other favoured and enumerated liabilities of the company so the excepted Crown debts are left in association in ranking with such residue of the other favoured liabilities as is also excepted from preference. But it is said, and the decision of *In re Galvin* (1) does undoubtedly support the contention, that the main justification for the view that this result is secured in bankruptcy is not to be found in this statute. There is not here the provision which is now s. 33, sub-s. 7, of the Bankruptcy Act, 1914: "Subject to the provisions of this Act, all debts proved in the bankruptcy shall be paid pari passu"; and it was undoubtedly the absence of a similar provision in the Irish Bankruptcy Act which led Palles C.B. in the case cited to place the excepted Crown debts in the position of postponed preference above explained. I feel the full force of that view. Nor do I think it can be met by a reference to s. 207 upon which for this purpose Sir John Simon so strongly relied. In view of the presence in the statute of s. 209 exactly defining permitted preferences, and in view of the interpretation placed by the Legislature itself upon the corresponding words in s. 10 of the Judicature Act, 1875, I am unable to find in the words "debts provable" as used in that section, any reference to priorities, or any reference therefore to the bankruptcy provision now represented by s. 33, sub-s. 7, of the Act of 1914.

But while, on the actual wording of s. 209, I hesitate to say that it is necessary to find in the Act, in order to attain the first or bankruptcy result, any analogue to s. 33, sub-s. 7, I do in this Act find such analogue, and one applicable here, in s. 186, sub-s. 1. That section says this: "The following

(1) [1897] 1 I. R. 520.

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consequences shall ensue on the voluntary winding-up of a Company: (1) The property of the Company shall be applied in satisfaction of its liabilities pari passu." This section is an exact transcription of s. 133 of the Act of 1862. Found in that place, the words, as is pointed out by Palles C.B., did not refer to Crown debts, because such debts are nowhere mentioned in that statute.

But in the Act of 1908 it is different. Crown debts are mentioned in s. 209 of the Act. Not only so, but other debts which had no preference at all under the Act of 1862 are thereby given an associated preference—debts which would rank pari passu as ordinary liabilities if they were not so preferred. Sect. 186, sub-s. 1, accordingly now, as s. 133 never had to do, must yield to construction. Sect. 186, sub-s. 1, and s. 209 cannot stand together unless there be implied at the commencement of s. 186, sub-s. 1, the words, "Subject as hereinafter provided," or words to that effect. And so soon as such words are introduced you necessarily include in the liabilities which are to be satisfied pari passu, the Crown debts not preferred by s. 209, seeing that that section does include some Crown debts amongst the liabilities of the company which are so to be preferred. Accordingly reading s. 186, sub-s. 1, as in my judgment the Court is now bound to read it you find there the exact analogue of the bankruptcy s. 33, sub-s. 7, which in the view of Palles C.B. is decisive to produce the result on which I am now insisting.

In my judgment, therefore, on the true construction of the Companies (Consolidation) Act, 1908, Lord Macnaghten's "wider prerogative" is now in the winding up of an insolvent company under that Act entirely gone. And there is no doubt this company is insolvent; indeed it must be taken so to be because no suggestion is made that it is not: *In re Milan Tramways Co.* (1)

Having thus reached the conclusion that the "wider prerogative" is in this liquidation gone, I proceed to consider whether the second prerogative is still existent. It is

(1) (1884) 25 Ch. D. 587, 591.

contended by the Crown that it remains in force, even if the other is gone, and that, although the exercise of either prerogative where both exist is not so much an independent but an alternative process for realizing from the same property the same product. From this point of view it may be well at the outset to consider what the success of this contention of the Crown would involve to other creditors interested in this liquidation. And, first of all, the retention of this prerogative by the Crown would in no way require it to assert all its claims against the company by distress or execution. It would not preclude it from proving in the liquidation if it were to its interest so to do for its associated preference claims or any of them, obtaining satisfaction of its other demands only by distress or execution. This being remembered, it would appear that the retention of this prerogative involves in the case of a company's liquidation under the Act of 1908 the following consequences: (1.) To the extent to which it was exercised, as Chitty J. pointed out in *In re Oriental Bank Corporation* (1), the assets left to be administered by the liquidator would be the assets of the company less that portion of them taken away by the Crown. (2.) The Crown if it pleased would be able to take away or appropriate to itself assets sufficient in value to satisfy either (*a*) every Crown debt whether one preferred or postponed in the liquidation, or (*b*) its postponed debts only. (3.) In the latter case the Crown would if it chose be enabled to prove in the liquidation for its preferred debts, with the privilege in respect of that proof of sharing in the extended range of the company's assets which by s. 209 are made available for their payment. In other words, the Crown by the intelligent exercise of this prerogative would be in a position while depriving the other associated preference creditors of equal treatment with itself to assume a position of exclusive preference to them not only in respect of its claims which in the liquidation are on an equality, but also in respect of those which in the liquidation are postponed. Alternatively the Crown by reserving for proof in the liquidation

(1) 28 Ch. D. 643, 649.

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its preferred claims under s. 209 could in respect of these obtain its proportion of secured assets which are quite beyond the reach of its prerogative right. The question now to be solved therefore is whether on principle a right which would be so destructive of the relative positions of the Crown and the other creditors as defined by s. 209 can be held to be retained. The appellants say that it cannot, and they sought to make this contention good by relying again on s. 207 of the Act. They said that the effect of that section was to introduce into winding up the provisions of s. 151 of the Bankruptcy Act, 1914, which take away the remedies of the Crown against the property of its debtor. In my opinion that contention cannot succeed. It has already with reference to s. 10 of the Judicature Act, 1875, been negatived by Chitty J. in words which seem to me applicable to the present section also. "It appears to me to be plain," he says, "that that portion of s. 150 which takes away the remedies of the Crown against the property of the debtor is not brought into the winding-up Act by reason of the 10th section. . . . . That prerogative is not taken away by the words which relate to the debts provable, and relate to them only." But Sir John Simon found in *Attorney-General* v. *De Keyser's Royal Hotel* (1), and particularly in a passage from the speech of Lord Atkinson in the House of Lords, the statement of a principle which does in my judgment when applied to this Act of Parliament suffice to carry his contention that this second prerogative of the Crown is now also necessarily gone. "It is quite obvious," says Lord Atkinson (1), "that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd . . . . when such a statute, expressing the will and intention of the

(1) [1920] A. C. 539.

King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance . . . . after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been." I think that principle is applicable here to this second prerogative right. I have shown how destructive of the rights of others conferred, with adequate compensation to the Crown, by the section which extinguishes the wider prerogative, the continued exercise by the Crown of this second prerogative would be. Indeed it seems to me that s. 209 and the second prerogative cannot co-exist. I quite agree that the Crown is not in terms to be bound except on a clear construction of the words used to bind it. But when I re-read *In re Henley & Co.* (1) in the light of this s. 209, and ask whether the Lords Justices there would have so readily expounded the existence of the second prerogative in a case in which the wider prerogative had been excluded, I feel that the mind of the Court was in no way addressed to that state of things. The truth is that the two rights in the case of a company in liquidation are so far complementary that if the first is gone it is contrary to reason that the second should remain.

The absence from the Act of 1908 of any section corresponding to s. 151 of the Bankruptcy Act, 1914, will still leave to the Crown the exercise of this prerogative between the date of the commencement of the winding up and the date of the winding-up order, or in the case of a voluntary liquidation the confirmatory resolution: *In re Bonham.* (2) But in my judgment so soon as the liquidation of an insolvent company is fully constituted this prerogative is under the present Act altogether extinguished.

(1) 9 Ch. D. 469. (2) 10 Ch. D. 595.

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In my judgment, therefore, the Crown here is only entitled to a right of proof for an ordinary unsecured debt. I think the appeal should be allowed.

Appeal allowed.

Solicitors for the appellant: *F. C. Mathews & Co.*

Solicitor for the Crown: *The Solicitor to the Board of Trade.*

G. A. S.

EVE J. 1922 — *April* 5.

In re STOKES.

PUBLIC TRUSTEE *v.* BROOKS.

[1921. S. 5394.]

Will—Appointment—Special Power—General testamentary Power—Construction—Gift of particular Interest—Residuary Bequest—Contrary Intention—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 27.

Under her father's will a testatrix had a general power of appointment in default of issue over the capital and income of a trust fund, and also a special power of appointment notwithstanding coverture over the income of the same fund in favour of her husband for life. By her will made in exercise of the special power and of "every power enabling her in that behalf" she appointed the income of the trust fund to her husband for life, and then devised and bequeathed "all her estate and effects whatsoever and wheresoever" to trustees upon trust to pay the proceeds and annual income to her husband for life, and after his decease and that of her sister, to divide the capital and income between her two brothers:—

Held, that as the subject matter of each appointment was not necessarily the same, and as, under the circumstances, there was no inconsistency between the two parts of the will by reason of a double gift of a life interest to the husband there had been no such expression of a contrary intention within s. 27 of the Wills Act, 1837, as to defeat the gift of the residue; and the will was a good exercise by the testatrix of the general power of appointment under her father's will.

The dictum of Wood V.-C. in *Scriven* v. *Sandom* (1862) 2 J. & H. 743, 745 considered and distinguished.

Adjourned Summons.

By his will dated April 27, 1874, James Stokes after giving a specific and pecuniary legacy to his wife, Mary Stokes, gave all his real estate and the residue of his personal estate to his wife and his two sons upon trust to sell the real estate

and get in or sell the residue of the personal estate, and to pay the annual income thereof to his wife for life, and as to a sum of 3000*l.*, part of his trust fund, to be in trust for his daughter, Caroline Stokes, and as to another sum of 3000*l.* in trust for his daughter, Frances Sarah Stokes, and he directed his trustees to hold the sum of money to be held in trust for each of his daughters upon trust to pay the annual income thereof to each daughter for her life for her sole and separate use, independently of her husband for the time being and without power of anticipation, and after the decease of his same daughter as to both capital and income of the 3000*l.* upon such trusts for the benefit of the issue of his same daughter as she should by deed or will appoint and in default in trust for his grandchildren who should attain an absolutely vested interest and in default then upon trust for such persons or purposes and in such manner as the same daughter should by will, or codicil, appoint, and in default of such appointment, over; and he empowered each of his said daughters notwithstanding anything thereinbefore contained and notwithstanding coverture, by her will or codicil, to appoint to or in favour of her husband surviving her the whole or any part of the yearly income of her share in the said trust fund for the life of such husband, or for any interest terminable on or before his death. James Stokes died on February 10, 1877, and Mary Stokes on June 7, 1893. The daughter, Caroline Stokes, married James Tucker Criddle in 1890 and by her will, dated August 17, 1894, after reciting that under the will of her father, J. Stokes, she was empowered to appoint to or in favour of her husband the whole or any part of the yearly income of her share in the said trust fund for the life of her husband, in pursuance of such power and of "every power enabling her in that behalf," she appointed the income of the said trust fund to and for her said husband, J. T. Criddle, for his natural life; and she gave, devised and bequeathed "all my estate and effects whatsoever and wheresoever" unto her trustees thereinafter named upon trust to pay the net proceeds and annual income thereof to her said husband for and during his life, and after his decease, in trust to pay

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the same to her sister, Frances Sarah Stokes, for her life, and after her death upon trust equally to divide both capital and income between her two brothers, T. R. Stokes and J. G. Stokes; and she appointed her husband and her sister, F. S. Stokes, executors and trustees of her will. T. R. Stokes predeceased his sister Caroline. Caroline Criddle died on December 16, 1908, without ever having had any issue, and her husband and sister proved the will. James T. Criddle died on January 26, 1919, having appointed the defendants, John Wheeler, Francis Criddle, and J. M. Millard, executors thereof. Frances Sarah Stokes died on May 23, 1921, without ever having been married, and having by her will made in 1913 appointed the defendant, Aimée Maud Brooks, and John Wheeler executors and trustees thereof. By her will F. S. Stokes bequeathed and appointed to the defendant, James George Stokes, all the residue of the property of which she should die possessed, including that over which she had a power of appointment under the will of her father. Questions having arisen whether the residuary bequest in the will of Caroline Criddle operated as an appointment of the capital of her trust legacy to any and what extent, the public trustee and John Wheeler who were the present trustees of the will of James Stokes, took out an originating summons asking that it might be determined (inter alia) whether, on the true construction of the will of Caroline Criddle, and by virtue of s. 27 of the Wills Act, 1837, the bequest of "all my estate and effects whatsoever and wheresoever" in her said will operated to any and what extent as an exercise of the general power of appointment vested in her by the will of James Stokes over the capital and income of the trust legacy of 3000*l*. The other questions asked by the summons do not call for notice.

Greenland for the summons.

L. W. Byrne for the legal personal representative of F. S. Stokes, and for J. G. Stokes who was beneficially interested under her will. It is my interest to argue that a contrary intention has been expressed in this will by the testatrix,

Mrs. Caroline Criddle, within the meaning of s. 27 of the Wills Act, 1837, by the exercise of the special power, and there has been therefore no exercise by her of the general power of appointment under her father's will. No doubt in the appointment to her husband, made in pursuance of the limited power, to which she has expressly referred, there were added the words "and every power enabling me in that behalf." But there is an inconsistency between the two appointments, which amounts to evidence of a contrary intention. Under the first appointment the whole income of the trust fund in question would go in its entirety to the husband for life, whereas under the second appointment of the residue it would be subject to the payment of her debts and expenses. The subject matter would not be exactly the same. There is a duplication of the gift of a life interest to the husband. The only case which gives any assistance upon the point is that of *Scriven* v. *Sandom* (1), where Wood V.-C. says in his judgment: "If you find a gift of a particular interest, that may be inconsistent with an appointment of the whole to the same person." That was a dictum only in that particular case, but the present case comes within that which was contemplated by the Vice-Chancellor as sufficient to show a contrary intention.

Danckwerts for the legal personal representatives of J. T. Criddle. There has been a perfectly good exercise by Caroline Criddle of the general power which she had; there is no inconsistency between the two appointments. They were intended to meet two different contingencies. The onus of proving a contrary intention by what appears on the face of the will, according to s. 27 of the Wills Act, 1837, lies upon the parties who suggest it. In *Coxen* v. *Rowland* (2) it was held that a testatrix had indicated her intention of exercising a general power of appointment which she had. A similar case is *In re Marten* (3), where *Coxen* v. *Rowland* (2) was approved. *Scriven* v. *Sandom* (1) is referred to in Jarman on Wills, 6th ed., vol. i., p. 814, where the author says that

(1) 2 J. & H. 743, 745. (2) [1894] 1 Ch. 406.
(3) [1902] 1 Ch. 314.

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the suggestion of Wood V.-C. in *Scriven* v. *Sandom* (1) would probably not be followed, although founded on common sense : *Bush* v. *Cowan.* (2) A residuary gift such as this was includes everything that is undisposed of. The previous gift is not evidence of a contrary intention within s. 27 of the Wills Act. The most recent case on the absence of a contrary intention is *In re Doherty-Waterhouse* (3), which is the converse of this case.

L. W. Byrne in reply. The two interests given are not identical, the greater is given first. In *Coxen* v. *Rowland* (4) there was no reference to *Scriven* v. *Sandom* (5) and in *In re Marten* (6) there was a true residuary devise.

[EVE J. Are there any other cases of a contrary intention being exhibited in a will such as that in *Moss* v. *Harter* ? (7)]

The cases of *Boyes* v. *Cook* (8) ; *In re Clark's Estate* (9), as well as *Moss* v. *Harter* (7) are cases raising the question of contrary intention, but none of these really apply to the present. He also referred to *In re Phillips* (10) and *Thompson* v. *Simpson.* (11)

EVE J. By the will of her father, James Stokes, made in 1874, two powers of appointment were conferred upon his daughter Caroline, the one a special power, notwithstanding coverture, to appoint by will or codicil to her surviving husband the whole or any part of the yearly income of a sum of 3000*l.* for his life, or for any interest terminable on or before his death, and the other a general power, in default of issue, to appoint by will or codicil the capital and income of the said sum to such persons and for such purposes as she might see fit.

Caroline married, and by her will dated August 17, 1894, after reciting the special power, in pursuance thereof and of

(1) 2 J. & H. 743, 745.
(2) (1863) 32 Beav. 228.
(3) [1918] 2 Ch. 269.
(4) [1894] 1 Ch. 406.
(5) 2 J. & H. 743.
(6) [1902] 1 Ch. 314.
(7) (1854) 2 Sm. & Giff. 458.
(8) (1880) 14 Ch. D. 53.
(9) (1880) 14 Ch. D. 422.
(10) (1889) 41 Ch. D. 417.
(11) (1881) 50 L. J. (Ch.) 461.

"every power enabling her in that behalf" appointed the income of the fund to her husband for his life and devised and bequeathed all her "estate and effects whatsoever and wheresoever" to trustees upon trust to pay the net proceeds and annual income thereof to her husband for life, and after his death upon trust to pay the same to her sister for life, and after her death to divide the capital and income between her two brothers.

The testatrix died on December 16, 1908, without issue; her husband survived her and died in 1919.

The question is whether the will of the testatrix operated as a good exercise of the general power of appointment vested in her by the will of her father.

It cannot be disputed that the special power was duly exercised, and prima facie, the residuary gift operated under s. 27 of the Wills Act, 1837, as an exercise of the general power. But it has been argued that there is a contrary intention within the meaning of the statute and that there is to be found in this will something inconsistent with the view that the general bequest was meant as an execution of the power.

In support of this contention the observation of Wood V.-C. in *Scriven* v. *Sandom* (1) that "if you find a gift of a particular interest, that may be inconsistent with an appointment of the whole to the same person" is relied upon, but in that case, where the gift of a life interest to the wife was followed by a general bequest to her of the residue, and the question was whether this could properly be held to operate as the exercise of a general power of appointment in her favour, the Vice-Chancellor held that there was no inconsistency between a direction to pay the income to the wife for life and the further intention to give her an interest in the capital of the fund, and in the course of his judgment observed: "It would not be a safe rule to proceed upon, to pick out little circumstances, and infer from them whether the testator had or had not in his mind the intention of exercising the power; there ought to be shown something

(1) 2 J. & H. 743, 745.

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which can fairly be described as inconsistent with such an intention."

The circumstances I have to deal with here are not the same as in that case. It is true that a particular interest is given to the husband by the exercise of the special power and, if the general power is exercised, he takes as one—but only as one—of the appointees. In this respect the present case is not so strong in favour of the argument for contrary intention as was *Scriven* v. *Sandom.* (1) Is there then anything in the will inconsistent with the opinion that the testatrix meant the residuary bequest to operate as an execution of the power? I have already pointed out that the residuary bequest does not give the whole of the fund to the husband, he only takes a life interest thereunder and there is certainly no inconsistency between the appointment of a life interest to him under the special power and the appointments to the sister and brothers; again the special power could be effectually exercised whether the testatrix had issue or not, and the effect of its exercise was to give her surviving husband a life interest in the whole fund; the appointment under the general power, on the other hand, could only take effect in default of issue attaining a vested interest and would only operate on the fund subject to the payment of the testatrix's debts.

The subject matter of each appointment was not therefore necessarily the same, and the fact that the residuary bequest extends to appointees who took no interest under the exercise of the special power outweighs in my opinion any inconsistency which might otherwise be held to arise by reason of the double gift of a life interest to the husband. Had the special power been exercised by codicil it could not I think have been argued that the general power was not exercised by the will, and this is perhaps a good test whether the exercise of the special power in the will is in this case inconsistent with an intention to exercise the general power by the residuary bequest.

In the absence of any authority concluding the matter in a contrary sense I think I am bound to hold that, in the

(1) 2 J. & H. 743.

circumstances, the will of the testatrix operated as a due exercise by her of the general power of which she was the donee under her father's will.

Solicitors for all parties: *Le Brasseur & Oakley, for Stone, King & Wardle, Bath.*

G. M.

In re WITHAM.

CHADBURN *v.* WINFIELD.

[1922. W. 220.]

Statutes of Limitation—Mortgage of reversionary Interest in mixed Funds—Proceeds of Sale of Land—Falling into Possession—"Present right to receive"—Real Property Limitation Act, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *ss.* 1, 5, 34—*Real Property Limitation Act,* 1874 (37 *&* 38 *Vict. c.* 57), *ss.* 2, 8.

A testator gave the whole of his residuary estate in trust for his wife for life, with remainder to his children in equal shares, and he died in 1894, leaving a widow and seven children. In 1903 one of the testator's sons mortgaged his one-seventh share in his father's estate, which at that date consisted of personalty and realty. The testator's widow died in 1918, and after her death most of the realty was realized. No interest was ever paid, and no acknowledgment of the mortgage debt was given since 1903:—

Held, that the mortgage debt, as against the proceeds of sale of the real estate, was barred by s. 8 of the Real Property Limitation Act, 1874.

In re Owen [1894] 3 Ch. 220 followed.

Hugill v. *Wilkinson* (1888) 38 Ch. D. 480 distinguished.

ADJOURNED SUMMONS.

By his will, dated June 21, 1893, the testator directed his trustees to stand possessed of his real estate, and to sell and convert into money all his residuary personal estate, and invest the proceeds thereof, and to pay the net annual income arising therefrom to his wife during her life, if she should continue his widow, and after her decease or remarriage upon trust to sell, call in, and convert into money the trust premises, and hold the net proceeds in trust for all his children to be divided equally among them, their executors,

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administrators, and assigns, the shares of such children to be absolutely vested in them on his death. The testator died on February 26, 1894, leaving a widow and seven children him surviving. By an indenture of mortgage, dated May 4, 1895, C. E. Witham, a son of the testator, assigned his one-seventh share in his father's estate to the Nottingham and Nottinghamshire Banking Company as security for moneys advanced by the bank. By an indenture dated September 9, 1903, the mortgage was transferred to the widow of the testator on her paying to the bank the sum of 637*l.* 12*s.* 9*d.*, the amount then owing by the mortgagor, and the mortgagor covenanted to pay to her on March 9, 1904, the 637*l.* 12*s.* 9*d.*, with interest at 5 per cent. per annum, and also so long as any principal money should remain due to pay interest at the same rate by equal half-yearly payments. No interest was ever paid and no acknowledgment of the debt was given since the transfer in 1903. C. E. Witham died on March 29, 1905, intestate, leaving a widow and three children. His widow died in 1907, having by her will appointed E. Hallsworth (since deceased) and the defendant, J. W. Witham, executors. The testator's widow died on April 2, 1918, having by her will, dated June 30, 1911, devised and bequeathed her residuary estate upon trusts for the benefit of her six children and their issue, not including C. E. Witham or his issue. None of the real estate of the testator had been sold down to the death of his widow. Since her death, however, the greater part of such real estate has been realized. The legal personal representatives of C. E. Witham having claimed that the mortgage debt was barred, both as to principal and interest, by reason of the Statutes of Limitation, and that they were entitled to the one-seventh share of the testator's residuary estate, the testator's executors took out this summons asking whether they were entitled to and ought to pay such representatives the one-seventh share of the testator's residuary estate, or whether they were entitled to apply the whole or any and what part of such one-seventh share in or towards payment to the executors of the testator's widow of the

amount of the principal and interest owing under the indenture of September 9, 1903. At the hearing of the summons, it was admitted, on behalf of the legal personal representatives of C. E. Witham, that the debt was not barred as against the personal estate of the testator, and the question of interest was whether the debt was barred as against the proceeds of sale of the real estate.

J. F. Carr for the plaintiff.

Vaisey for the executors of the testator's widow. The covenant for payment of the mortgage debt is barred after twenty years in the case of personalty, and twelve years when the mortgaged property includes land. That is true even in the case of a reversionary interest: *Kirkland* v. *Peatfield*. (1) It is admitted, therefore, that the personal remedy against the mortgagor is barred. The rights of the mortgagee against the property in so far as it consists of personalty is unaffected by any statute of limitation. In so far as the mortgaged property is realty in possession the right against it is barred after twelve years, but in the case of a reversionary interest in realty the twelve years only begins to run from the date when the reversion falls into possession: Withers on Reversions, p. 167; *Hugill* v. *Wilkinson* (2); Fisher on Mortgages, 6th ed., p. 406. *In re Hazeldine's Trusts* (3) is distinguishable, because there the property mortgaged was the absolute interests of beneficiaries under a will. The fact that the personal remedy on the covenant is barred does not affect the remedy against the property: *London and Midland Bank* v. *Mitchell*. (4) Again the mortgagee is entitled to the whole arrears of interest on the mortgage debt, and not only to the interest for six years. The limit of six years only applies when the mortgagee forecloses or applies for payment out of Court. If the mortgagor seeks to redeem he must pay all arrears of interest: *Smith* v. *Hill* (5); *Mellersh* v. *Brown* (6); *In re Lloyd* (7); *Dingle* v.

(1) [1903] 1 K. B. 756.
(2) 38 Ch. D. 480.
(3) [1908] 1 Ch. 34.
(4) [1899] 2 Ch. 161.
(5) (1878) 9 Ch. D. 143.
(6) (1890) 45 Ch. D. 225.
(7) [1903] 1 Ch. 385.

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Coppen. (1) A mortgagee's interest in land settled upon trust for sale is an interest in land within the Real Property Limitation Acts: *In re Fox.* (2) On a summons by trustees asking whether they are entitled and ought to pay the mortgagee out of a beneficiary's interest, the mortgagee is entitled to interest in full as he is not applying for payment.

J. W. F. Beaumont for the legal personal representatives of the mortgagor. The mortgagee's claim against the property for the principal moneys is barred by virtue of s. 8 of the Real Property Limitation Act, 1874. *Hugill* v. *Wilkinson* (3) is a case under s. 1 of the Act of 1874 or the corresponding section of the Act of 1833. Here the reversionary interest runs in land given in trust for sale. The mortgagee cannot, therefore, recover the land under s. 1 of the Act of 1874. In the case of "money charged on land" to which s. 8 of the Act of 1874 applies, time runs from the date when the title to recover it arose. It was for some time doubted whether in such a case the personal remedy was also barred at the end of the twelve years, but ultimately it was held that it was: *Sutton* v. *Sutton* (4); *Kirkland* v. *Peatfield.* (5) *In re Hazeldine's Trusts* (6) and *In re Fox* (2) have decided that the proceeds of sale of land are an interest in land, and therefore in this case the mortgage is gone under s. 8 of the Act of 1874.

[SARGANT J. Nothing could be enforced against land until it falls into possession.]

That does not matter under s. 8, which is aimed at preventing mortgagees sleeping on their rights. *Hugill* v. *Wilkinson* (3) only applies where the mortgagee is bringing an action for possession of the land.

[SARGANT J. Neither the mortgagee nor the mortgagor could have brought an action against the land until it fell into possession.]

It comes back to whether this case comes under s. 2 or s. 8

(1) [1899] 1 Ch. 726.
(2) [1913] 2 Ch. 75.
(3) 38 Ch. D. 480.
(4) (1882) 22 Ch. D. 511.
(5) [1903] 1 K. B. 756.
(6) [1908] 1 Ch. 34.

of the Act of 1874. It is entirely covered by *In re Owen* (1), where Stirling J. held that legatees were barred under s. 8. It is impossible to escape from the language of s. 8, and therefore the Court is relieved from *Hugill* v. *Wilkinson.* (2)

Vaisey in reply. This case is nearer *Hugill* v. *Wilkinson* (2) than *In re Owen.* (1) In *In re Owen* (1) there was no right to bring an action to recover the land. Here the mortgagee could have brought an action for foreclosure of his interest.

[SARGANT J. That would not be for foreclosure of the land.]

That does not matter for the purpose of the Statutes of Limitation. If the mortgagee's right is extinguished by s. 8, why was it not extinguished in *Hugill* v. *Wilkinson* (2)? In *In re Owen* (1) there was never any intention in the minds of the parties that the date for repayment should be postponed; here postponement is the essence of the matter. If *In re Owen* (1) is followed to its conclusion then *Hugill* v. *Wilkinson* (2) is no authority, although in subsequent cases it has never been so treated. Sect. 8 never contemplated a mortgage of a reversion, where the mortgagee does not expect to recover until the reversion falls in.

SARGANT J. This is a case of considerable difficulty, and with regard to which I do not say that the judgment I am about to give entirely reflects my own view of what would do the greater justice between the parties; but I have to deal with an exceedingly technical subject matter, with regard to which there have been a number of decisions by judges of high authority, and I must follow the very definite views which have been expressed by my predecessors. The question here is how far the rights of a mortgagee have been barred under the Real Property Limitation Act of 1833 as amended by the Act of 1874 with reference to a mortgage on a mixed fund arising from the proceeds of real and personal property. I have to decide whether the mortgage on which no interest has been paid, and with regard to which

(1) [1894] 3 Ch. 220. (2) 38 Ch. D. 480.

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no acknowledgment has been given since the year 1903, is still an effective charge upon the proceeds of sale of the real estate and the proceeds of sale of the personal estate. As a matter of fact the trustees have paid to the representatives of the mortgagee a certain sum of money, and no doubt if my decision is against them the persons who received that payment will take steps to repay the amount, but I am not able to make any order on them. Are these proceeds of sale as to the whole or some part of them subject to the mortgage, or has the mortgage, whether as to the whole or some part of them, ceased to be operative and been extinguished by virtue of s. 34 of the Act of 1833 ?

As regards so much of the proceeds of sale as has arisen from the conversion of the personal property, Mr. Beaumont, who appears for the representatives of the mortgagor, agrees that there no statute of limitation is applicable, and therefore that the representatives of the mortgagee are entitled to the whole of those proceeds to the extent of the mortgage money due to them from the year 1903, but those proceeds will not be sufficient to satisfy the mortgage debt and interest. The question therefore arises whether as to the balance of the mortgage debt remaining unsatisfied out of those proceeds there is an effective mortgage debt binding the proceeds of sale of the real estate which has been sold and the anticipated proceeds of sale of the estate which remains to be sold, of course in each case to the extent of the one-seventh share of the mortgagor.

The subject matter has been dealt with in a good many cases, but I am bound by and may begin with the decision of the Court of Appeal in *In re Hazeldine's Trusts* (1) followed by Warrington J. in *In re Fox* (2), under which the proceeds of sale of land which has been directed to be sold were held to be land within the definition of the Real Property Limitation Act of 1833. Then, assuming that they are land, and therefore within the definition of the Act, am I to consider that the right to recover and the limitations imposed by the Act are to be determined under s. 5 of the Act as modified with regard to

(1) [1908] 1 Ch. 34. (2) [1913] 2 Ch. 75.

the length of time by s. 2 of the Real Property Limitation Act, 1874, or am I to deal with the matter as being covered by s. 8 of the Act of 1874? Assuming that the property were land, a mere reversionary interest in land, the decision that appears to be applicable is that of North J. in *Hugill* v. *Wilkinson*. (1) The headnote there is: "Time begins to run for the purpose of barring a foreclosure action on an equitable charge on a contingent reversionary interest in land only from the time the interest falls into possession." That is only about four years ago in this case. North J. there decided the question on the basis that the remedy of the chargee was a right to recover land by foreclosure. He bases his judgment expressly upon that footing. He says (2): "Now the right of John Wilkinson against Joseph Wilkinson and the persons claiming under him, is a right to enforce a charge. That charge may be enforced by way of foreclosure. An action for foreclosure, or the right to bring an action for foreclosure, seems to me to be the same thing, for this purpose." Therefore North J. came to the conclusion in that case that the right was regulated by the provisions of s. 1 of the Act of 1874 corresponding with s. 2 of the Act of 1833, and that the right remained until twelve years after the time for bringing an action for recovery of the amount, that is to say, twelve years from the time when the reversionary interest fell into possession.

That being so it looks at first sight as if the persons who claim under the mortgage are entitled to succeed, because if this is land, and it appears to be within the definition of land in the definition section of the Act, and it was held to be land by the judgments of the Court of Appeal and of Warrington J. to which I have referred, then it would seem that the interest being reversionary the judgment of North J. would cover the case. And I must say that to myself it seems exceedingly hard that a mortgagee who has only got a charge on a reversionary interest should be barred from his right to recover, because he has taken no step as against the interest during the time the interest was in reversion. But I have to

(1) 38 Ch. D. 480. (2) 38 Ch. D. 483.

SARGANT J. 1922 WITHAM, *In re.* CHADBURN *v.* WINFIELD.

consider the case of *In re Owen* (1), a decision of Stirling J. In my view that decision does absolutely and entirely cover the case here, and I am bound to follow it.

The case there was this. A testator was under the will of his father entitled to a contingent reversionary interest in land. The testator himself had died in 1854, and by his will he devised all his real estate, which included, of course, this reversionary interest, to his wife for life. After her death he charged the same with a sum of money, which he bequeathed in four legacies of equal amount to his son and three daughters, and subject thereto he devised all his real estate and the contingent interest to his son. The widow died in the year 1880, and shortly after her death the whole of the testator's real estate then in actual possession was sold and the legacies were partly paid, but no steps were taken to realize the testator's interest under his father's will previous to its falling into possession, which happened in 1893, thirteen years after the death of the widow. It was held that the right of the legatees to recover the balance of their legacies was barred by s. 8 of the Real Property Limitation Act, 1874, and *Hugill* v. *Wilkinson* (2) was explained and distinguished.

The words of s. 8 of the Act of 1874 are these: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given," and so on. The first important part of the decision of Stirling J. is where he says (3): "The words 'present right to receive' are to be read according to their ordinary meaning in the English language: *Hornsey Local*

(1) [1894] 3 Ch. 220. (2) 38 Ch. D. 480.
(3) [1894] 3 Ch. 225.

Board v. *Monarch Investment Building Society.* (1) Now, a present right to receive this sum of 8000*l.* accrued in 1880: in fact, part was then received by each of the persons to whom it was payable; and the balance might have been raised by a sale or mortgage of the interest of the testator under the will of David Owen. In my opinion, the right to recover the balance is barred by this enactment."

It is observable that there the legacy became payable, just as the mortgage here became payable, long prior to the falling in of the reversionary interest. It became payable under the testator's will on the death of his widow in 1880, although it was only raisable so far as this decision was concerned as to the balance—the learned judge was only dealing, of course, with the balance; part of it was paid—out of a property which only fell in in 1893, thirteen years after, and the decision is that "the present right to receive the same" is the present right of the mortgagee to receive the mortgage money, or the legatee to receive the legacy, from the person who had to pay it. It is not the date at which the reversionary interest, if there is a reversionary interest, falls into possession. That is the first part of the judgment of Stirling J., which seems to me to be entirely relevant here and to govern this case.

Then Stirling J. goes on to deal with and distinguish *Hugill* v. *Wilkinson.* (2) He says (3): "In opposition to this conclusion, there was cited the case of *Hugill* v. *Wilkinson* (2), where it was held that an equitable mortgagee of a reversionary interest in land is not debarred from asserting his claim against the land until the expiration of twelve years from the time when the reversionary interest falls into possession. When the grounds of that decision are examined, they are found to be these: first, that an equitable mortgagee has a remedy against the land by way of foreclosure; secondly, that an action for foreclosure is not an action to recover money charged on land, but to recover land itself: *Harlock* v. *Ashberry* (4); *Heath* v. *Pugh* (5); and,

(1) (1889) 24 Q. B. D. 1.
(2) 38 Ch. D. 480.
(3) [1894] 3 Ch. 225.
(4) (1882) 19 Ch. D. 539.
(5) (1881) 6 Q. B. D. 345; (1882) 7 App. Cas. 235.

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thirdly, that the time within which an action for the recovery of land may be brought is regulated, not by s. 8, but by ss. 1 and 2, of the Real Property Limitation Act, 1874. The question then arises, whether any such reasoning applies to the present case; and it appears to me that it does not apply, unless the persons entitled to the benefit of these charges on the land have in respect of them a right of foreclosure." Then the learned judge proceeds to examine the case from the point of view merely of ascertaining whether there was a right in the legatee to obtain foreclosure. He came to the conclusion that there was no right to obtain foreclosure, and that, therefore, *Hugill* v. *Wilkinson* (1) did not apply, that s. 8 did apply, and that the time from which the section ran having been the date when the legacy became payable and not the date when the reversion fell into possession the requisite number of years had elapsed, and the mortgage had been extinguished by virtue of the provisions of s. 34 of the Act, and it had therefore gone for all purposes.

That case, I think, shows that the relevant date for the purpose of the case here is the date when the mortgagee became entitled to receive his money, and not the date when the reversion subject to the mortgage fell into possession. I think it is also binding on me, unless it is the case that here the mortgagee had a right to proceed against the land itself by way of foreclosure. In my opinion it is quite clear that the mortgagee had no right to proceed against the land by way of foreclosure. Mr. Vaisey has put it in this way, that inasmuch as land in the Act is defined so as to include an interest in land, and of course proceeds of sale of land, which was the view taken in the case in the Court of Appeal, and the view taken by Warrington J., therefore the mortgagee who has a right against that interest in land, or the proceeds, has something equivalent to a right to recover land by way of foreclosure, but in my judgment that cannot be so for this reason. Although the definition section places a wide general meaning on land so as to include proceeds of sale of land and any

(1) 38 Ch. D. 480.

interest in land that is only in case the context does not otherwise require, and in my judgment when we come to s. 5 of the Act or s. 2 of the replacing Act the context does require that the word "land" shall be read in a narrower sense so as to satisfy the words "a right to make an entry," and so on. One gets to this extraordinary result, that if this were a mortgage of land itself the right would not be barred under *Hugill* v. *Wilkinson* (1); if it were a mortgage of the personalty, which the proceeds of sale of land are held to be for many purposes, it would not be barred, because there is no statute of limitation applying to a mortgage of personalty; but this appears to be an interest which is sufficiently within the wide definition of land in s. 1 of the Act of 1833 to be caught within the ambit of s. 8 of the Act of 1874, and, on the other hand, it is not quite sufficiently land to come within the terms of s. 5 of the Act of 1833 and s. 2 of the Act of 1874. Here the mortgagee had no effective remedy, really, at all against the property itself, although he had a remedy against the mortgagor by bringing an action of foreclosure and getting foreclosure against the interest of the mortgagor, although not against the land itself. The mortgagee finds, unfortunately I think, that he has allowed the term to lapse from the relevant or material date—namely, the date of the mortgage—and he is consequently barred as to this interest.

Further, it is not disputed that if the interest in question is within s. 8 there has been an extinguishment of the whole interest of the mortgagee under s. 34 of the Act of 1833. Therefore I am sorry to say that the mortgagee, so far as concerns this part of his security, is debarred by s. 8 of the Act of 1874 and has had the interest extinguished by s. 34 of the Act of 1833. This decision is quite contrary to my inclination, and I think it works something in the nature of a practical injustice. But while *In re Hazeldine's Trusts* (2) stands—and I could wish that that decision might be reviewed at some future date by the Court of ultimate appeal—I have no option but to follow it.

There will have to be an inquiry to ascertain the

(1) 38 Ch. D. 480. (2) [1908] 1 Ch. 34.

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respective values of the real estate, and the personalty at the date of the transfer of the mortgage, that is to say, the effective mortgage of 1903.

Solicitors: *Hinds & Roberts, for Bryan & Armstrong, Mansfield, Notts; Peacock & Goddard, for Elliot, Smith & Co., Mansfield, Notts.*

P. J. B.

ASTBURY J. 1922 *June* 21.

In re HONE AND PARKER'S CONTRACT.

[1922. H. 1702.]

Settled Land—Undivided Shares—Some Shares settled—Life Tenants' statutory Powers—Trustees—Power of Sale over Entirety—Conflict—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 56, *sub-s.* 2—*Settled Land Act,* 1884 (47 *&* 48 *Vict. c.* 18), *s.* 6, *sub-s.* 2.

Where trustees have a power of sale over an entire land estate, which is held by the beneficiaries in undivided shares, some absolutely, and some by life tenants and remaindermen, there is no conflict within s. 56, sub-s. 2, of the Settled Land Act, 1882, between the trustees' power of sale over the entirety and that of the life tenants over the settled undivided shares. The trustees' power of sale can therefore be exercised without the consent of any of the life tenants.

Observations of the Court of Appeal in *In re Morris' Settled Estates* [1920] 2 Ch. 229 followed.

Decision of Kekewich J. in *In re Osborne and Bright's, Ld.* [1902 1 Ch. 335, so far as not overruled, not followed.

VENDOR AND PURCHASER SUMMONS.

By his will dated October 11, 1881, a testator devised all his real estate to the use of his trustees upon certain trusts during his wife's life and after her death upon trust to stand seised thereof upon trust, As to one undivided third part thereof for his son David his heirs and assigns, and As to one other undivided third part thereof upon trust for the testator's son William for life with remainder to William's children as therein mentioned, and As to the remaining third part upon trust for the testator's daughter Selina for life with remainder to her children as therein mentioned.

The trustees were expressly empowered to sell the estate or any part thereof.

The testator died on June 26, 1885, and his wife on January 17, 1900.

By a conveyance on sale dated March 26, 1908, the trustees and a mortgagee conveyed Blackacre (part of the estate) to the present vendor's predecessor in title for 1100*l.* There was no evidence that the consent of either of the life tenants to this sale was obtained.

On March 7, 1922, the vendor contracted to sell Blackacre to the present purchaser for 2000*l.*

On examining the title the purchaser took the objection that the conveyance of March 26, 1908, was invalid on the ground that having regard to s. 56, sub-s. 2, of the Settled Land Act, 1882, and s. 6, sub-s. 2, of the Settled Land Act, 1884 (1), the trustees' power of sale could not be exercised without the consent of a life tenant of one of the undivided shares.

The vendor contended that as there was not and never had been any life tenant or life tenants of the entirety, inasmuch as David's share was devised to him absolutely, no such consent was necessary, and on April 28, 1922, he issued this summons for a declaration to that effect.

Greenland for the vendor. In 1908 the trustees had a power of sale over the entirety of the property. The life tenants

(1) The Settled Land Act, 1882, provides as follows:—

Sect. 56, sub-s. 2: "But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act."

The Settled Land Act, 1884, provides:—

Sect. 6, sub-s. 2: "In the case of every other settlement, not within the meaning of s. 63 of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in sub-s. 2 of s. 56 of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exerciseable for any purpose provided for in that Act."

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in combination had only a statutory power over two-thirds. There was therefore no conflict within s. 56, sub-s. 2, of the 1882 Act, and no consent was necessary. In *In re Morris' Settled Estates* (1) the trustees had obtained the consent of some of the life tenants of the settled shares and the Court of Appeal held that this was sufficient. To that extent the decision of Kekewich J. in *In re Osborne and Bright's, Ld.* (2) was overruled. The question therefore whether there was any conflict necessitating any consent at all did not really arise. But it was discussed, and the Court, though not directly deciding the point, expressed very strong views to the effect that there was no conflict.

P. M. Walters for the purchaser. There was clearly a conflict pro tanto as regards the two settled shares. This point was definitely argued and decided in *In re Osborne and Bright's, Ld.* (2), where some shares only remained in settlement. That point has not been overruled.

In *In re Morris' Settled Estates* (3) Lord Sterndale M.R. held that the beneficiaries—i.e., life tenants and absolute owners —were entitled to concurrent estates or interests "in the entirety." Otherwise there was no person who had any concurrent estate or interest as life tenant "in the entirety" and no consent would be required. He did not express any very strong approval of the latter view. Warrington L.J.'s remarks (4) are much more decided, and if read without reference to the rest of his judgment might even include a case where there are life tenants of all the undivided shares. The point however was left expressly open, and the law reporter has properly recorded it as a quaere and not a semble. The Court should therefore follow the express decision in *In re Osborne and Bright's, Ld.* (2)

ASTBURY J. after stating the facts and reading the two sub-sections in question. The short answer to the purchaser's contention is that there were no life tenants or life tenant of the entirety of the property sold in 1908.

(1) [1920] 2 Ch. 229, 233, 234, 235, 237, 239.
(2) [1902] 1 Ch. 335.
(3) [1920] 2 Ch. 229, 237.
(4) [1920] 2 Ch. 239.

In *In re Osborne and Bright's, Ld.* (1), on which the purchaser relies, the will gave the trustees a power of sale over the whole estate, but some of the undivided shares were settled. Kekewich J. held (*a*) that there was a conflict between the provisions of the will and the provisions of the Act within s. 56, sub-s. 2, of the Settled Land Act, 1882, and (*b*) that the life tenants of the undivided shares did not together constitute a life tenant for the purposes of that Act, so that s. 6, sub-s. 2, of the Settled Land Act, 1884, was inapplicable and the consent of one life tenant insufficient.

The second point was overruled by the Court of Appeal in *In re Morris' Settled Estates.* (2) They held that even assuming there was a conflict between the trustees' power and that of the life tenants of the fasciculus of settled shares, the consent of one life tenant was sufficient.

On the first point—namely, whether there was in fact any such conflict at all—they gave no direct judgment. But both Lord Sterndale M.R. and Warrington L.J. expressed views which it is impossible for me to disregard even if I were disposed to do so.

Lord Sterndale M.R. said (3): "It seems to me that the only possible alternative would be to hold that there is no tenant for life of the entirety at all. If these persons are not to be considered as either tenants in common or persons entitled for concurrent estates or interests in the entirety, there is no person who has any concurrent estate or interest as tenant for life in the entirety, and in that case no consent would be required at all; but I prefer to rest my judgment upon the ground that they are persons entitled for concurrent estates or interests, and, therefore, the consent of one only of them is necessary."

Warrington L.J. said (4): "With regard to the other point, inasmuch as it is unnecessary to express any definite opinion upon it, I refrain from doing so, but I think it is a matter for serious consideration whether in such a case as the present there is any tenant for life at all of that over which the

(1) [1902] 1 Ch. 335.
(2) [1920] 2 Ch. 229.
(3) [1920] 2 Ch. 237.
(4) [1920] 2 Ch. 239.

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trustees have the power of sale—namely, the entirety. It is said that the exercise by the trustees of that power would conflict with the power of each tenant for life to sell his own undivided share. In a sense it would, but then I think the answer is that the testator has given to the trustees a power which puts an end to the division into aliquot shares altogether and which enables the trustees to sell the whole and to substitute for land held in equity, in common, money which is divisible amongst persons in the shares laid down by the testator. As I say I do not express any definite opinion upon the point, but I think it may well be said that the power which the trustees have exercised is a distinct power altogether from that which is given to each tenant for life, treating each aliquot share as the subject of a separate settlement. On the first point I am satisfied that if there is a conflict such as that which was held to exist by Kekewich J., then that conflict only extends to what I have called the fasciculus of shares as to which there are tenants for life, and . . . . the consent of one only of those persons is necessary."

In accordance with those views, with which I respectfully concur, I hold that in the present case there was no conflict of powers and no consent was necessary. There will be a declaration to that effect and the purchaser must pay the costs.

Solicitors: *Metcalfe, Hussey & Hulbert; Bolton, Jobson and Yate-Lee.*

G. R. A.

Applied. KAIN *v.* NORFOLK. [1949] 1 Ch. 163

ATTORNEY-GENERAL *v.* HODGSON.

PETERSON J.

1922

March 23, 24, 29, 30, 31; *April* 12.

[1921. B. 3268.]

Local Government—County Borough—Public Park—Grant of Carriage Way to neighbouring Houses—Byelaws prohibiting Use by Motor-cars—Motor-car a "Carriage"—Public Safety—Reasonableness.

Between the years 1853 and 1861, five lots, part of a larger area of land which had been purchased for providing a public park for the benefit of the inhabitants of Bradford, were sold off for private residences and were conveyed to the respective purchasers "together with a right of carriage horse and footway" through the park when laid out, but subject to such byelaws rules and regulations as should from time to time be made by those having the control of the park for the purpose of (inter alia) "promoting safety and for establishing and maintaining the character of the park as a place of public recreation." Each of the lots had a carriage-way entrance on its southern side into the park and on its northern side into a public road. In 1863, the remainder of the land, known as Peel Park, containing 58 acres, was conveyed to the Bradford Corporation subject to the rights of way so granted. In July, 1907, the Corporation under the powers of a local Act made a byelaw prohibiting motor-cars or other similar mechanically drawn vehicles from using the park. In 1920, the defendant purchased one of the five lots and then disputed the validity of the byelaw and asserted a right under the grant in the original conveyance of his lot to drive his motor-car through the park. Subsequently, in order to obviate any objection that their existing byelaw was only made under their statutory power, the Corporation "as the body having control of Peel Park and for the purpose of promoting safety and for establishing and maintaining the character of the said park as a place of public recreation," made a further byelaw prohibiting any motor-car or other similar mechanically drawn vehicle from passing through any part of the park to or from any of the houses on the lots in question. Before passing this byelaw the Parks Committee, after consideration, determined that it was necessary in the interests of public safety to prevent the owners of the lots from driving motor vehicles over the roadways of the park.

The Court in granting an injunction against the defendant:—

Held, that the right of carriage way was not restricted to carriages impelled by any particular kind of traction, and that a motor-car was within the meaning of the grant, but

Held, further, that the byelaws which had been made by the Corporation in the interests of public safety and in exercise of its two-fold power, under the statute and the deed of conveyance, were not unreasonable but were valid.

The dicta of Lord Russell of Killowen C.J. in *Kruse* v. *Johnson* [1898] 2 Q. B. 91, 99–100 applied.

THIS was an action by the Attorney-General on the relation of the Corporation of Bradford, and by the Corporation,

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for an injunction to prevent the defendant from driving motor-cars or other similar mechanically driven vehicles to or from his residence, known as "Park House," on the roads in Peel Park. The question in issue depended upon the validity of certain byelaws of the Corporation.

In 1850, the land now comprising Peel Park was purchased by means of public subscriptions, in order that a public park might be provided for the benefit of the inhabitants of Bradford, and was conveyed to William Brook Addison and Henry Brown. It was decided to sell off for private residences five lots on the north side of the land so purchased, and in May, 1853, these five lots were put up for sale by public auction. The particulars of sale stated that the purchasers of these five lots would be allowed to have private gates of access to Peel Park, and would have limited rights of carriage road through the park. The plan attached to the particulars of sale showed the five lots in question and also indicated the roads or proposed roads in the park, including one which ran along the southern boundary of the five lots. The conditions of sale provided (inter alia) that the purchaser of each lot should enclose it on the south side by a fence of a specified description with a cast iron "carriage or foot gate." The conditions also stated that it was the vendors' intention to lay out the land to the south of the lots as a public park and pleasure grounds "with roads drives and promenades," and that the purchasers of the five lots should have "rights of carriage horse and foot way through the Park when so laid out (but not for carts wagons or drays or for persons bearing burdens or carrying parcels) at such hours as the Park should be open to the public, but subject to such byelaws rules and regulations as should from time to time be made by those having the control of the Park for the purpose of preserving order and decorum, promoting safety, and for establishing and maintaining the character of the Park as a place of public recreation and at other times subject to such payments byelaws rules and regulations as should from time to time be required and made by those having such control as aforesaid." Four of the lots were sold at the auction, but

Lot 2 (to which the defendant was now entitled) was not then sold.

By a deed of December 27, 1853, which recited the material stipulations contained in the particulars and conditions of sale, the purchasers of Lots 1, 3, 4 and 5 covenanted with Messrs. Addison and Brown to abide by and observe the stipulations and restrictions contained in the particulars and conditions of sale.

In 1861 Lot 2 was sold to Mr. William Milnes by Messrs. Addison and Brown, and this lot was conveyed to him by a deed of December 30, 1861. The parcels in this deed consisted of Lot 2, " together with all roads ways paths privileges and appurtenances to the said plot of land belonging or appertaining or therewith held used occupied or enjoyed and in particular with a right of carriage horse and footway through Peel Park aforesaid " described and limited in terms precisely similar to those contained and set out in the above-mentioned condition of sale. Subject to the conditions stipulations and provisions contained in the deed of December 27, 1853, Messrs. Addison and Brown entered into the usual covenant for the quiet enjoyment of the property conveyed subject as aforesaid. The plan on the conveyance of Lot 2 showed a public road called Bolton Lane on the north and a " carriage road " in Peel Park on the southern boundary with two entrances to this carriage road from the lot. Mr. Milnes subsequently erected " Park House " on this lot, having one carriage drive from the roadway in Peel Park and another from Bolton Lane, which was now known as Lister Lane. This property was purchased by the defendant in the early part of 1920.

By an indenture of November 7, 1863, Messrs. Addison and Brown conveyed Peel Park to the Bradford Corporation. This deed recited the conveyances to the purchasers of the five lots, the deed of covenant of December 27, 1853, that the rest of the land which had been acquired had been laid out as a park and pleasure ground, and that by virtue of the Public Health Act, 1848, and the Bradford Improvement Act, 1850, the Corporation was empowered to provide public

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walks or pleasure grounds. The conveyance was expressed to be subject to the provisions of the deed of covenant of December 27, 1853, and it provided that with the exception of a certain number of days the Corporation should permit the park to be used and enjoyed from sunrise to not later than one hour after sunset on all days in the week as a public walk, park and playground by all persons choosing to resort thither and conducting themselves in a peaceable and orderly manner subject nevertheless to such orders and regulations as should from time to time be made by the Corporation for regulating the use and enjoyment of the park; and the Corporation was empowered to close the park for any number of days not exceeding ten in any year subject only to the rights of the several persons to whom Messrs. Addison and Brown had granted rights of way through the park.

The following further statement of the facts and of the result of the evidence at the trial is taken from the considered judgment of Peterson J.: "The Park consists of about 58 acres. It has two main entrances, one at the north-west corner from Bolton Road, the other at the south-east corner from Cliffe Road and Otley Road. From the Bolton Road entrance a carriage drive runs in curves along the southern boundary of Lots 1, 2 and 3, and then sweeps round and emerges at the Otley Road gate. This carriage drive has not any footpath. Its width appears to vary between a little over 20 feet and a little over 22 feet. At a short distance from the Bolton Road entrance there is on the south side of the drive a flight of steps leading down to the conservatory, the lake and the 'children's corner.' On either side of the steps along the drive are trees and shrubs. Further along the drive there is another path leading down to the lake. There is a tramway in Bolton Road, with a compulsory 'stop' adjoining the entrance into the Park. Flower Shows are held from time to time at the conservatory. There was a difference of opinion as to the number of persons who resort to the park, but on the evidence, I think that the number of persons including children, often unattended, who frequent the Park and particularly that part of it in which are

the conservatory, the lake and the children's corner is considerable."

"In the year 1907 there was an agitation in Bradford against the use of the Parks by motor-cars. Complaints were made to various members of the Council. Very narrow escapes were reported and the local Press took up the question. The matter was considered by the Council, who ultimately came to the conclusion after rejecting the suggestion that the imposition of a speed limit would meet the requirements of the case, that the Parks were not safe for the public owing to the action of motor drivers, and that the only way to protect the public was to stop cars from going into 'the Parks.' At this time the existing byelaw, No. 5, provided that horses and carriages should be allowed to enter the Parks where carriage drives were provided, but that no horse or carriage should be permitted to halt or loiter so as to impede the passage along such carriage drives, and that with the view of preventing accidents to children and others no person having the charge of any horse or carriage should pass in or out at any entrance of the Parks except at a walking pace. On the 9th July, 1907, the Council, in pursuance of the powers contained in the Bradford Corporation Gas and Improvement Act, 1871, made two byelaws in lieu of the existing byelaw, No. 5, in reference to regulating or preventing the admission of horses and vehicles into the Parks of the Corporation. The first was identical with the existing byelaw, No. 5, except that it began with the words 'subject as hereinafter provided.' The second was in these terms: 'No motor-car motor carriage motor-bicycle motor tricycle or other similar mechanically driven vehicle shall be allowed at any time to enter or pass through any of the said Parks.' In coming to the conclusion that the use of motor vehicles in the Parks ought to be prohibited the Council did not specially consider the position of the owners of the houses on the north side of Peel Park. These byelaws were in due course approved and allowed by the Home Secretary. Section 54 of the Act of 1871 under which those byelaws were made enacted that the Corporation might in manner prescribed by the Municipal Corporation

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Acts make byelaws 'for all or any of the following purposes relating to any Park or place of public resort or recreation to be hereafter acquired and formed under this Act, or relating to any Park or public place of resort at present held by the Corporation or under their control.' One of these purposes was 'for regulating or preventing the admission of horses and vehicles thereto.'"

"The byelaws of 1907 thus prohibited the use of motor-cars in Peel Park, and from that time motor-cars no longer entered the Park. There is evidence that on some occasions Lady Priestley went by motor-car through the Bolton Road entrance along the carriage drive to visit Mrs. Milnes at 'Park House,' and that the present owner of 'Bolton House' (Lot 3) once or twice in each year drove from his house along the carriage drive to Bolton Road. But these were apparently cases in which the motor-cars in question were not seen by the policeman who had charge of the Park. The evidence is that Lady Priestley's husband, when he visited 'Park House' stopped his car outside of the Bolton Road entrance, and that others who were detected driving in motor-cars in the Park were stopped and reported to the Council and thereupon apologised for their breach of the byelaw. The owner of 'Bolton House,' except on the occasion of his annual demonstrations, always used his entrance from Lister Lane; the owner of 'The Mount' (Lot 1) used his entrance into Bolton Road and not his entrance into the carriage drive; while Mrs. Milnes (the owner and occupier of 'Park House') did not possess a motor-car. The defendant in 1920 purchased 'Park House' and entered into occupation towards the end of that year. He then asserted his right to pass along the carriage ways of the Park to and from 'Park House' in a motor-car and disputed the validity of the byelaw so far as it affected the owners of Lots 1, 2, 3, 4 and 5."

"It then occurred to the advisers of the Corporation that it might possibly be objected that the byelaw of 1907 had been made under the provisions of the Bradford Gas and Improvement Act, 1871, and was not a byelaw made under the powers reserved in the conveyances to the purchasers

of Lots 1, 2, 3, 4 and 5. The Council accordingly on the 12th April, 1921, as 'the body having the control of Peel Park,' made the following Regulation, 'for the purpose of promoting safety and for establishing and maintaining the character of the said Park as a place of public recreation,' namely, 'No motor-car motor carriage motor bicycle motor tricycle or other similar mechanically driven vehicle shall be allowed at any time to pass through any part of Peel Park to or from any of the houses situate next Lister Lane and adjoining Peel Park on the northern boundary thereof or the grounds of any of the said houses.' Before they resolved to recommend the Council to pass this byelaw, the Parks Committee considered the question whether it was necessary in the interests of public safety to prevent the owners of the houses on the north side of the Park which had access to the carriage drive from driving motor vehicles over the roadways of the Park, and determined that it was. The Committee did not on this occasion consider whether the imposition of a speed limit would suffice. The question of a speed limit had been discussed and determined in 1907, when the Council decided to prohibit the use of any motor vehicle in any of the parks."

Cunliffe K.C. and *J. G. Wood* for the plaintiffs. The defendants' private right of carriage way does not include or entitle him to the use of motor vehicles, and even if it does, the byelaw of the plaintiff Corporation was properly made and is valid and reasonable.

In decisions upon the construction of wills the word "carriage" has on the context been held not to cover motor-cars: *In re Hall* (1); *In re Ashburnham* (2); *In re White* (3); and *In re Fortlage* (4); but different considerations apply in this case. It would be unreasonable to construe this grant in the wide sense and so impose on the grantor, by extending it to motor-driven vehicles, a burden which could not have been within the contemplation of the parties when

(1) (1912) 107 L. T. 196.
(2) Ibid. 601.
(3) [1916] 1 Ch. 172.
(4) [1916] W. N. 214.

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the grant was made. "Carriage horse and footway" is the collocation here which indicates the nature of the grant and excludes mechanically driven vehicles.

This grant was made subject to byelaws, which would be made under a statutory power, and to rules and regulations, which would be made in pursuance of the contractual relations created by the deed of grant, by those persons having control of the park. The byelaw of 1907 was duly made under the powers of the Bradford Corporation Gas and Improvement Act, 1871, on full information and after investigation; and where there is nothing manifestly unjust and no bad faith in connection with a byelaw the Court will not interfere with it as unreasonable: *Kruse* v. *Johnson* (1); *Slattery* v. *Naylor*. (2) The later regulation prohibiting motor-cars was expressly made in pursuance of the Corporation's contractual rights, and was bona fide and valid.

Hughes K.C. and *Whinney* for the defendant. Carriage way includes user by every sort of wheeled vehicle irrespective of its motive power or method of propulsion. The question was involved in *White* v. *Grand Hotel, Eastbourne, Ld.* (3), and there was no suggestion in that case that carriage way did not permit user by motor-cars. A carriage way is a right of way for all purposes and is unrestricted: *United Land Co.* v. *Great Eastern Ry. Co.* (4); Gale on Easements, 7th ed., p. 306.

The byelaw of 1907 related to the public and did not affect the rights of the owners of the five lots. To affect those rights, the Corporation must show that the regulation is necessary for promoting safety, and if it is not necessary then the byelaw or regulation is unreasonable. The byelaw and regulation do not recognize the right granted to the owners of the lots at all, and it is unreasonable to interfere with those private rights of owners which stand on a different and higher grade than those of the general public; for instance, the right is granted at such hours as the park is open to the public

(1) [1898] 2 Q. B. 91.
(2) (1888) 13 App. Cas. 446.
(3) [1913] 1 Ch. 113; [1913] W. N. 306.
(4) (1875) L. R. 10 Ch. 586.

and " at other times " as well. The grant is made for valuable consideration and the Corporation is not entitled to derogate from it except for promoting safety, and whether it is necessary for that purpose is for the Court to decide. *Kruse* v. *Johnson* (1) makes it clear that the Court has the power and the duty to interfere where byelaws are unreasonable, and these byelaws are oppressive and interfere with the special rights and grant given to these five lots: *Rex* v. *Broad* (2); and the danger in the case of these five houses is infinitesimal. Even from the public point of view these byelaws are unreasonable; the object of the park is for recreation, and if for cycles and horses why not for motor-cars, subject to a speed limit? Motor-cars are allowed in the London parks, and it is believed that Bradford is the only place where the public parks are closed to them. Power to regulate or control does not authorize entire prohibition or prevention: *Municipal Corporation of City of Toronto* v. *Virgo* (3); and there is no difference for this purpose between byelaw and regulation: *Mitcham Common Conservators* v. *Cox* (4); it is only a question of degree. There is no evidence of any serious danger to the public from the exercise of this private right.

Other cases in which byelaws have been held bad are: *Saunders* v. *South Eastern Ry. Co.* (5); *Dyson* v. *London and North Western Ry. Co.* (6); *Heap* v. *Burnley Union* (7); *Strickland* v. *Hayes* (8); *Alty* v. *Farrell* (9); *Scott* v. *Pilliner*. (10)

Cunliffe K.C. in reply.

Cur. adv. vult.

April 12. PETERSON J. stated the facts as above set out and continued: The plaintiffs' first contention was that the conveyance to Mr. Milnes did not grant a right of way for motor vehicles; that the right was confined to carriages

(1) [1898] 2 Q. B. 91.
(2) [1915] A. C. 1110.
(3) [1896] A. C. 88.
(4) [1911] 2 K. B. 854.
(5) (1880) 5 Q. B. D. 456.
(6) (1881) 7 Q. B. D. 32.
(7) (1884) 12 Q. B. D. 617.
(8) [1896] 1 Q. B. 290.
(9) [1896] 1 Q. B. 636.
(10) [1904] 2 K. B. 855.

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to which was applied the kind of traction known in 1861. In support of this argument reference was made to various cases, such as *In re Hall* (1); *In re Ashburnham* (2); *In re White* (3); and *In re Fortlage.* (4) These were cases in which the Court in construing wills came to the conclusion that, having regard to the context, the word "carriage" did not include a motor-car. But authorities of this kind have not any bearing on the present case. The question which I have to consider is what is meant by a carriage way in the conveyance of 1861. The right which was granted was a right to pass along the roads on foot or on horse or in carriages. There is not, I think, anything in the deed which shows that the right of carriage way is restricted to carriages which are impelled by any particular kind of traction; nor is there in my opinion any ground for saying that the word "carriage" ought to be restricted to a carriage drawn by horses. A motor-car is, I think, a carriage within the meaning of this grant.

The real question in this case is whether the byelaws which have been made are so unreasonable as to be invalid. There are many cases in which byelaws made by local authorities have been declared by the Courts to be invalid. Instances of the exercise of this jurisdiction are to be found in *Heap* v. *Burnley Union* (5); *Strickland* v. *Hayes* (6); *Alty* v. *Farrell* (7); *Scott* v. *Pilliner.* (8) But it has been laid down by very high authority that byelaws made by public representative bodies ought to be supported if possible, and that the Courts ought to be slow to condemn as invalid such byelaws on the ground of supposed unreasonableness; and it has been pointed out that a byelaw is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to have been made: see *Kruse* v.

(1) 107 L. T. 196.
(2) 107 L. T. 601.
(3) [1916] 1 Ch. 172.
(4) [1916] W. N. 214.
(5) 12 Q. B. D. 617.
(6) [1896] 1 Q. B. 290.
(7) [1896] 1 Q. B. 636.
(8) [1904] 2 K. B. 855.

Johnson (1); *Slattery* v. *Naylor*. (2) In *Scott* v. *Pilliner* (3), where the byelaw was held to be unreasonable, Lord Alverstone accepted the principle that the Court ought not to interfere with a byelaw made by a local authority if it can be supported on reasonable grounds. In *Kruse* v. *Johnson* (1) the Lord Chief Justice, Lord Russell, explained the grounds on which such byelaws might be declared invalid as being unreasonable. If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men; the Court might well say: "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But it is in this sense, and in this sense only, I conceive, that the question of unreasonableness can properly be regarded. In the present case the Council came to the conclusion that it was dangerous to persons resorting to the parks of Bradford that motor vehicles should be allowed inside the parks. To think that the use of motor vehicles may be attended with serious danger in a park frequented by young children and having roadways of 21 or 22 feet in width cannot be said to be unreasonable. Some persons may think that the necessary degree of safety might have been secured by the imposition of a speed limit. But this suggestion was considered and rejected by the Council, and having regard to the observations in *Kruse* v. *Johnson* (1), I am not prepared to say that the byelaw is unreasonable because it prohibited the use of motor vehicles in the park instead of attempting to limit their speed. The Council may well have thought that the imposition of a speed limit does not necessarily ensure its observance.

But it is said that, while this may be sound so far as the byelaw applies to the uses of motor vehicles in general, it is not so where the byelaw affects the special rights conferred upon the owners of the houses on the north side of Peel Park.

(1) [1898] 2 Q. B. 91. (2) 13 App. Cas. 446, 451, 452.
(3) [1904] 2 K. B. 855.

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It is to be remembered that the owners of these houses did not obtain grants of unrestricted rights of way. The conveyance to the defendant's predecessor granted a right of carriage way through the park subject to such byelaws, rules and regulations as should from time to time be made by the persons having the control of the park for the purpose (inter alia) of promoting safety. It was a right which was liable to be restricted and curtailed by the persons having control of the park. Nor do I think that the byelaws which are contemplated by the conveyance are byelaws dealing specifically and separately with the right of way of the particular grantee, or with the rights of the owners of the houses on the north side of the park. The conveyance contemplates that the persons having the control of the park may find it desirable to make byelaws for the purpose of regulating the conduct of all persons who resort to the park. Byelaws for the purpose of preserving order and decorum or establishing and maintaining the character of the park as a place of public recreation are obviously byelaws which are intended to apply to all persons who resort to the park. The defendant's predecessor thus agreed that his right of way should be subject to such byelaws of general application as the persons having control of the park might think it proper or desirable to make with the object of attaining the specified purposes. Sect. 54 of the Act of 1871 expressly gave the Corporation power to make byelaws for the purposes specified in the section in respect of any park then held by the Corporation or under its control; and one of the authorized purposes was regulating or preventing the admission of vehicles to the park. The Corporation has thus a twofold power, under the conveyance and under this section. It has considered the question of the use of motor vehicles in the park, both with respect to the users of such vehicles generally and with respect to the owners of the houses on the north side of Peel Park, and it has come to the conclusion that in all cases it is expedient in the interests of public safety to prohibit the use of motor vehicles in the park. It may well be that there are difficulties in the way of differentiating between motor-cars belonging to the owners

of the houses on the north side of the park or persons who visit those houses and motor-cars which belong to other members of the public. If a speed limit were imposed in the former case and the present absolute prohibition were applied to all other motor vehicles, it might not be easy to maintain the prohibition; for if the imposition of a speed limit sufficed in one case it might well be contended that it would be sufficient in the other case. Moreover, it would be difficult for the police constable who had charge of Peel Park to know whether a motor-car which was found in the park was or was not taking visitors to one of the privileged houses; and uncertainty on this subject might lead in practice to the use of the park by motor vehicles generally. I am not able to say that this determination of the Council was partial or unequal as between different classes, or was manifestly unjust or was such an oppressive or gratuitous interference as could find no justification in the minds of reasonable men. It was not and could not be suggested that the Council did not act honestly in its consideration of the question. In my opinion, then, the plaintiffs are entitled to an injunction restraining the defendant from driving motor vehicles over the roads in Peel Park in contravention of the byelaws.

Solicitors for the plaintiffs: *Torr & Co., for N. L. Fleming, Town Clerk, Bradford.*

Solicitors for the defendant: *Johnson, Weatherall, Sturt & Hardy, for Wade, Tetley, Wade & Co., Bradford.*

R. M.

P. O. LAWRENCE J.

1922

May 12, 16, 24.

In re JOWITT.

JOWITT *v.* KEELING.

[1922. J. 193.]

Apportionment—Will—Annuitant and residuary Legatees—Arrears due to deceased Annuitant—Interim Dividend—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *ss.* 2, 5.

A payment by a company to its shareholders out of revenue, in order to be apportionable under the Apportionment Act, 1870, need not be one which is usually made or declared at recurring intervals, but must be one which is made or declared in respect of a definite period.

A company, which had previously declared an interim dividend of 5 per cent. for the first half of its current financial year, subsequently during the same year passed a resolution that certain policy moneys then received should be distributed by way of "further interim dividend" and be paid in accordance with its Articles of Association, pro rata, to the holders for the time being of specified shares in the company, and later declared a final dividend of 5 per cent., which was stated to make up with the interim dividend of 5 per cent. previously declared, 10 per cent. for the whole year:—

Held, that the resolution for the distribution of the policy moneys, although expressed to be by way of further interim dividend, did not operate as a declaration that the payment of those moneys was made in respect of the then current financial year, and that in the absence of such a declaration and having regard to the nature and origin of that payment and the special rights conferred by the articles of the company, the moneys so distributed were not apportionable by virtue of the Apportionment Act, 1870.

In re Griffith (1879) 12 Ch. D. 655 distinguished.

ADJOURNED SUMMONS.

Robert Benson Jowitt by his will, dated September 11, 1908, appointed his three sons, the plaintiffs, Frederick McCulloch Jowitt, Robert Jowitt and Edward Maurice Jowitt executors and trustees thereof, and devised and bequeathed to them his real and residuary personal estate upon trust for sale and conversion and to stand possessed of his residuary estate upon trust to pay to his wife Caroline Jowitt during her life an annual sum of 1500*l.*, and subject thereto the testator bequeathed his residuary estate to his said three sons absolutely in equal shares. And the testator empowered his trustees to permit his personal estate in the hands of the firm of Robert Jowitt & Sons to continue in the same state

of investment so long as they should think fit, and declared that the profits or other income produced from such investment previous to the sale or conversion thereof should belong to the persons or person who would be entitled under the same trusts to the moneys arising from such sale or conversion or the income arising therefrom if such sale or conversion had actually taken place.

The testator died on November 9, 1914. Caroline Jowitt survived her husband, and died on March 15, 1921, her annuity under the trusts of her late husband's will having been regularly paid to her down to March 10, 1920. By her will dated September 11, 1908, she appointed Frederick M. Jowitt and Robert Jowitt executors thereof; and under the trusts thereof and of a codicil thereto the persons beneficially interested in her estate were as to one-fourth part thereof each of her three sons Frederick M. Jowitt, Robert Jowitt, and Edward M. Jowitt, and as to the remaining one-fourth part her three grandchildren therein named in equal shares contingently on their attaining the age of twenty-one years or in the case of females marrying under that age.

Frederick M. Jowitt died on September 19, 1921, having by his will dated July 25, 1921, appointed the defendants Edward M. Jowitt, Arthur Trowbridge Keeling, Gerald Cater Veale and George Blackwell executors thereof. Part of the residuary estate of the testator consisted of 11,800 ordinary shares in Robert Jowitt & Sons, Ld., which since the testator's death had been retained by the trustees of his will.

By art. 3 of the company's articles of association it was provided that all moneys received by the company in respect of certain policies of assurance therein mentioned should as and when received belong exclusively to the holders for the time being of the first 200,000 ordinary shares issued on the formation of the company and that such policy moneys should within seven days after the receipt thereof by the company, or as soon thereafter as the profits of the company should permit, be distributed amongst such holders of the 200,000 shares in proportion to the number of such shares held by them respectively.

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On October 5, 1921, the company received a sum of 25,000*l.* in respect of two of the policies referred to in art. 3; and on November 4, 1921, the directors of the company passed a resolution that that sum of 25,000*l.* "be distributed by way of further interim dividend free of income tax, and that in accordance with art. 3, such dividend be paid 'pro rata' to the shareholders for the time being of the first 200,000 ordinary shares in the company." On the same day the company paid the sum of 1475*l.* to the plaintiffs, such sum being the proportion of the 25,000*l.* attributable to the 11,800 ordinary shares held by them, which shares formed part of the first 200,000 ordinary shares issued by the company.

The expression "by way of further interim dividend" in the resolution of November 4, 1921, was accounted for by the fact that the directors of the company had on June 15, 1921, resolved to pay an interim dividend of 5 per cent. free of tax for the six months ended on May 20, 1921.

On February 10, 1922, at the ordinary general meeting of the company it was resolved "that a final dividend of 5 per cent. free of income tax be declared in respect of the year ending November 20, 1921, making with the interim dividend of 5 per cent. free of income tax already paid 10 per cent. free of tax for the year and that such final dividend be forthwith paid."

Under the company's articles the declaration of dividends formed part of the business of the ordinary general meeting of the company, which had to be held once in each calendar year, but by art. 106, the directors were empowered from time to time to pay to the members such interim dividends as appeared to them to be justified by the profits of the company. And by art. 105, it was provided that no dividend should be paid otherwise than out of the profits arising from the business of the company.

This summons was accordingly taken out by the two trustees of the will of the testator, each of whom was also beneficially interested, as before stated, against the defendants as the personal representatives of Frederick Jowitt deceased, and the three grandchildren of Caroline Jowitt (the deceased

annuitant) for the determination of the question whether her estate was entitled to an apportioned part of the sum of 1475*l.* so received by the plaintiffs or whether the whole thereof belonged in equal third shares to the plaintiffs and the personal representatives of the deceased son Frederick.

Lionel Cohen for the trustees.

Topham K.C. for the personal representatives of Frederick M. Jowitt. The sum in question is not apportionable. The dividend declared by the resolution of November 4, 1921, as a "further interim dividend" was not intended to be added to the interim dividend of 5 per cent. previously declared in respect of the first six months of the financial year (November 20, 1920, to November 20, 1921): the only meaning to be attached to the word "interim" in that resolution is that it was declared at a particular point of time, and this is emphasised by the resolution of June 15, which stated that the final dividend of 5 per cent. made up with the interim dividend of 5 per cent. 10 per cent. for the whole of the financial year. That further interim dividend was not "a periodical payment" within the meaning of s. 5 of the Apportionment Act, 1870. True it is, the mere fact that it was not such a payment as was usually made at recurring intervals is not enough to preclude the application of that Act: *In re Griffith* (1); yet as the sum here was not declared in respect of some definite period (as it was in the case cited) it is not apportionable, but the whole sum is payable to the residuary legatees.

F. D. Morton for the persons entitled to the estate of the deceased annuitant. The sum in question, although in the nature of a windfall, is apportionable within the meaning of the Act of 1870; see ss. 2, 5. It is not necessary that the payment should be a recurring one: *In re Griffith* (1); it is enough if it were made or declared in respect of a definite period. The payment here was made out of the revenue of the current financial year: *Lubbock* v. *British Bank of South America* (2); and therefore the payment was

(1) 12 Ch. D. 655. (2) [1892] 2 Ch. 198.

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made in respect of that year. It was expressly declared to be a "further interim dividend," and was intended to be placed on the same footing in every respect as the interim dividend which had been declared on June 15, so as to make it a payment in respect of the period of the current financial year.

Cur. adv. vult.

May 24. P. O. LAWRENCE J. The question to be determined on this application is whether any part of a sum of 1475*l.* now in the hands of the plaintiffs as trustees of the above-named testator's will belongs to the estate of the above-named testatrix, who was an annuitant under the testator's will, or whether the whole of such sum belongs to the testator's residuary legatees.

The solution depends upon whether the sum of 1475*l.* is apportionable under the Apportionment Act, 1870. If it is, then the estate of the testatrix is entitled to be paid the arrears of her annuity out of such proportion of that sum as under the Act ought to be considered as having accrued prior to the date of her death. If it is not, the whole sum belongs in equal third shares to the testator's sons, Robert and Edward, and the estate of the testator's deceased son, Frederick. [His Lordship then stated the material facts as set out above and proceeded :] Although, by virtue of s. 5 of the Apportionment Act of 1870 as interpreted by Jessel M.R. in *In re Griffith* (1), it is unnecessary that a payment made by a company out of revenue to its shareholders, in order to come within the purview of the Act, should be periodical in the sense that it must be a payment which is usually made at recurring intervals, yet, in my opinion, it is essential that a payment, in order to be apportionable under the Act, must be a payment which is declared or expressed to be made for or in respect of some definite period. If it were otherwise, I find it difficult to see how it could be considered as accruing from day to day.

Mr. Morton contended that the expression "by way of

(1) 12 Ch. D. 655.

further interim dividend" in the resolution of November 4, 1921, operated as a declaration or expression that the payment of the 25,000*l.* was made for or in respect of the then current financial year. His grounds for this contention were that the word "further" operated to link up the interim dividend declared on November 4 with the interim dividend declared on June 15, and that as the last mentioned dividend was expressed to be paid in respect of a definite period (namely, for the six months ending May 20, 1921) therefore the "further" dividend declared on November 4 was also a dividend declared in respect of a definite period which period was defined by the word "interim" to be the period between the commencement and end of the company's then current financial year.

Although the contention thus put forward raises a question which, in my opinion, is not altogether free from doubt, I have come to the conclusion that Mr. Topham's argument on the other side furnishes the true answer to it.

In my opinion the word "further" in the resolution was intended to denote merely that the dividend in question was another interim dividend besides the one declared on June 15. It clearly cannot mean that the dividend declared on November 4 was to be added to the interim dividend already declared on June 15, so as to make it a dividend declared in respect of the period of six months ending May 20. Moreover it would, in my opinion, be unduly straining the meaning of the word "further" to hold that it meant that the dividend was one expressed or declared to be made in respect of some defined period, merely because the dividend of June 15 was declared or expressed to be made for a defined period.

The word "interim" in the resolution was, in my opinion, not intended to define the period in respect of which the payment of the 25,000*l.* was made, but was intended merely to refer to the time at and the manner in which the dividend was declared.

In my opinion the word "interim" in the resolution means that the dividend is one which is paid by the directors on some date between the ordinary general meetings of the company. That this is the meaning attributed by the

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directors to the word "interim" is borne out by the wording of the resolution of June 15, 1921, in which, besides using the word "interim," there is added the period in respect of which the dividend then resolved upon was to be paid.

Much reliance was properly placed by Mr. Morton upon the decision of Jessel M.R. in *In re Griffith.* (1) The distinction, however, between that case and the present is, that there the sum divided (which consisted of surplus profits) was expressed to be in respect of a defined period of five years, whereas here the payment of the 25,000*l.* was not expressed to be made in respect of any period. That the company did not intend the 25,000*l.* to be part of the dividend for the then current financial year is further shown by the resolution passed at the ordinary general meeting of the company held on February 10, 1922, at which it was resolved "that a final dividend of 5 per cent. free of income tax be declared in respect of the year ending November 20, 1921, making with the interim dividend of 5 per cent. free of income tax already paid 10 per cent. free of tax for the year and that such final dividend be forthwith paid." Having regard not only to the absence of any mention in the resolution of November 4, of any period in respect of which the payment of the 25,000*l.* was made, but also to the nature and origin of the sum then distributed, and to the special rights in respect thereof conferred by art. 3, upon the original holders of the first 200,000 ordinary shares, I am of opinion that the payment of the sum of 25,000*l.* cannot properly be said to have been made for or in respect of any particular period so as to bring it within the scope of the Apportionment Act, 1870.

Accordingly I hold that the sum of 1475*l.* is outside the purview of the Act and is divisible amongst the residuary legatees to the exclusion of the estate of the annuitant.

Solicitors: *Trower, Still, Parkin & Keeling.*

(1) 12 Ch. D. 655.

H. C. H.

BELTON *v.* BASS, RATCLIFFE AND GRETTON, LIMITED.

RUSSELL J.

1921

Nov. 17, 18, 21, 22; *Dec.* 1.

[1920. B. 2085.]

Mortgagor and Mortgagee—Proposal by Mortgagee to grant an Option over Shares to an intended Purchaser—Advised not within their Powers—Sale by Mortgagee—Whole of Purchase Money advanced to Purchaser by Mortgagee—Right of Purchaser to resell to Mortgagee—Validity of Sale—Motive.

B. J. B. mortgaged certain shares in a brewery company. The mortgagees, who had full power to sell the shares, were desirous in 1914 of giving an option to F. R. G. to purchase them at a future date, but were advised by their solicitors that this would not be within their powers. They then sold the shares to F. R. G. at a fair price, and advanced him the whole of the purchase money without interest, and gave him the right to call on them to repurchase the shares at the price he gave for them at any time before May 1, 1917. The money so advanced was secured by a deposit of the share certificate and by a promissory note, which on the face of it was expressed to be payable on demand. F. R. G. paid the mortgagees the purchase money before May 1, 1917. In 1920 he sold the shares at a price considerably in excess of what he had paid for them. B. J. B. then brought an action, alleging that the transaction was not a valid sale, and claiming that the shares or their proceeds were still subject to redemption:—

Held, that the Court could not inquire into the motives of the mortgagees, and that the transaction was a valid exercise of their power of sale.

WITNESS ACTION.

The plaintiff, Bernard Joseph Belton, was a son of John Belton, who died in 1905. Under the will and codicils of his father the plaintiff became entitled to a one-fourth share of his father's residuary estate, subject to the payment of annuities amounting to 1000*l.* a year. John Belton was at the time of his death the registered holder of 3000 ordinary shares of 10*l.* each in the Welch Ale Brewery, Ld. On January 19, 1906, the plaintiff executed a document charging in favour of Barclays Bank, Ld., a freehold hotel and also his one-fourth share and interest of and in the residuary real and personal estate passing to him under the will and codicils of his father with the payment of 15,000*l.* with interest at 5 per cent. per annum, and further advances. He thereby

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also agreed to execute a regular and valid mortgage of his said interests with full mortgage powers when called upon.

In the year 1907 securities belonging to the estate of John Belton were set aside to answer the annuities. These securities did not include any of the shares in the Welch Ale Brewery. At the same time a scheme was agreed to by the residuary legatees under which the securities not retained to meet the annuities were allotted amongst themselves. Under this scheme the plaintiff was allotted 750 shares of the Welch Ale Brewery. They remained, however, in the name of John Belton, and it was not till December, 1909, that they were transferred to Barclays Bank, who became the registered holders thereof on December 31, 1909.

On March 31, 1909, the plaintiff executed an indenture in favour of the defendants, Bass, Ratcliffe & Gretton, Ld. This document contained a recital of the plaintiff's title to one-fourth of the residuary estate of his father, subject to the annuities, followed immediately by a recital that the residuary estate had been divided between the beneficiaries, except the items of property specified in Part I. of the first schedule thereto, and Part I. of the first schedule contained as the items then representing the estate the assets which had been set aside to answer the annuities, and nothing else. The indenture by the first parcels charged in favour of the defendants Bass " all that equal one-fourth share and interest of him the said Bernard Joseph Belton of and in the properties and assets stocks funds and securities forming the residuary real and personal property of the said John Belton deceased to which the said Bernard Joseph Belton is entitled under the will and codicils of the said John Belton, and all other (if any) his share estate and interest under the said will and codicils already accrued and to accrue thereunder." The document also contained a covenant to execute a legal mortgage, which in terms extended only to the premises described in Part I. of the first schedule. On September 12, 1912, the defendants Bass took a transfer from Barclays Bank of the charge of 1906, there being then a sum of 1800*l.* due thereunder for principal, interest and costs. By

February 7, 1913, the amount due on the charge of 1906, together with all interest and costs, had been paid off.

In 1910 the Welch Ale Brewery was in a dangerous financial condition.

The defendants Bass were mortgagees to a considerable extent of the Welch Ale Brewery, and Arthur Clay, one of the directors of the defendants Bass, invited the defendant Garrard to join the board of the Welch Ale Brewery upon special terms as to work and remuneration. Garrard agreed, and he was appointed a director of the Welch Ale Brewery as from May 1, 1910, and he worked hard and successfully. He did not consider his remuneration sufficient, and there was a suggestion by Clay that the principal shareholders in the Welch Ale Brewery (namely, a Mr. Hayward, the plaintiff, and three of his brothers) should give Garrard an option over 2000 shares in the Welch Ale Brewery for a period of seven years. Nothing came of this at the time. In May, 1914, the suggestion was revived, but again nothing came of it. On June 24, 1914, Garrard wrote to Clay: "It will be within your recollection that when the reorganisation of the Welch Ale was taken in hand, it was suggested that I should be given an opportunity of taking an option upon a block of ordinary shares to extend over a period of seven years. There were so many difficulties to surmount, and the principal shareholders were so heavily involved that it was impossible to carry the suggestion out. The business has now been placed in a much more satisfactory position, and I think an option upon shares could now be arranged, and with this in view I saw Mr. Austin Belton and Mr. Hayward. I gather that they will be able to let me have an option upon 600 shares at 1*l.*, but the representatives of Mr. Bernard Belton, whose affairs are in the hands of the Master in Lunacy, state that they will be unable to move. They feel, however, that the 750 shares held by Bass & Co. part of the securities taken over from Barclay's Bank, and upon which we held a charge from Mr. Bernard Belton, could be sold to me, and should represent the contribution of Mr. Bernard Belton for what I have done towards the reorganisation of the

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business. I would either buy the shares now or take an option. The market price, now, so far as we are able to judge, is about 10*s.* The only sale is a small lot of 20, about 6 months ago at 10*s.* and re-sold at 13*s.* 4*d.* I shall be glad if you will consider the matter."

On July 25, 1914, the board of the defendants Bass resolved that authority be given to their nominees, in whose names the 750 shares stood, to give to Garrard the option to purchase the 750 shares at 1*l.* per share for a period of seven years as from May 1, 1910. Garrard was at that time a director of Bass & Co. On July 31, 1914, they resolved that authority be given to the nominees to transfer the shares into Garrard's name, who should give a declaration in respect of the same.

On August 7, 1914, the defendants Bass wrote to their solicitors: "We shall be obliged if you will kindly send us certificate for 750 10*l.* Shares of The Welch Ale Brewery, as these are being transferred to our Mr. F. R. Garrard."

On August 8, the solicitors replied: "We are in receipt of your letter of yesterday, and as requested have pleasure in enclosing certificate No. 141 for 750 ordinary shares of 10*l.* each in the Welch Ale Brewery Nos. 1501–2000 and 4671–5010 inclusive, the receipt of which please acknowledge. If these are to be transferred to Mr. Garrard by way of sale, may we ask you kindly to let us know the amount of the purchase money to enable us to keep our record complete in respect of moneys received on account of the above loan."

On August 12 the defendants Bass wrote again to their solicitors: "In reply to your letter of the 8th inst., the present transaction in relation to the 750 10*l.* ordinary shares of the Welch Ale Brewery will not affect Mr. Belton's loan account, as no consideration is being paid at the present time. The shares, although transferred into Mr. Garrard's name, are to be held by him on trust. A deed of trust will have to be executed by Mr. Garrard who holds the option to purchase the shares at 1*l.* per share, for a period of 7 years as from May 1, 1910, but until he exercises this option no

consideration will be paid by him. We shall be obliged if you will prepare a deed of trust for his signature."

On the next day, August 13, the solicitors answered: "Thanks for your letter of yesterday. A mortgagee can only deal with the property the subject matter of his mortgage security strictly in accordance with the terms thereof, and as your security does not confer upon you the right to give an option, you cannot legally do what is proposed. As instancing what we mean and, of course, taking an extreme case, assuming that the 10*l.* ordinary shares are to-day of the value of 1*l.* only, and between now and May 1, 1917, such shares appreciate to the extent of their face value, you would be accountable to your mortgagor, or any person standing in his shoes, for 9*l.* per share, even if the Court would not upset the transaction entirely as not being within the scope of your powers. This contingency may never arise, but this matter is so complicated that you will probably feel it is not wise to further complicate it, and this more particularly seeing that Mr. Garrard is not only one of your directors, but is also a director of the Welch Ale Brewery, Limited. We defer preparing the declaration of trust pending our hearing further from you."

The defendants Bass wrote on August 17: "We are much obliged for yours of the 13th inst., and have carefully noted your remarks with respect to our position in the matter of dealing with the 750 10*l.* ordinary shares of the Welch Ale Brewery, which form part of our security. We assume from what you say that if we deal with them at all, it must be by sale. We shall be obliged if you will now advise us whether we must ask Belton's trustees if they are prepared to now redeem the shares at 1*l.* each, and if not to advise them that we shall sell. We assume that in case they cannot or will not redeem, we have the right to sell outright to Mr. Garrard."

On August 18 the solicitors replied: "We are obliged by your letter of yesterday. You will remember that Mr. Belton is an undischarged bankrupt and that the trustee of his estate is, or was, a Mr. Salaman. We believe the latter gentleman

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has satisfied himself that he is not likely to recover anything from his estate, and has accordingly applied for his discharge. Assuming that as a result of realisation of all your securities your total claim was satisfied and you had a balance in hand, it would not go to Mr. Belton or his receiver but to the Official Receiver in Bankruptcy. You will see therefore that it will be useless to communicate with Mr. Belton's receiver, and we do not advise your approaching Mr. Salaman, as if you did he would probably consider it a golden opportunity of fishing for information. Up to the present we have given him very little information as to the assets or securities in your hands, but the fullest information as to the amount of your claim. If you deal with the shares, it must, as you say, be by way of sale, and if 1*l.* is the present value of the shares you will be quite justified in selling at that figure. Unless the mortgage security otherwise provides, a mortgagee, if his powers have become exercisable, can sell the subject matter of the security without reference to his mortgagor, and if the sale is at an under value the mortgagor's remedy would be in damages. In the ordinary way and as a matter of courtesy, and also as erring on the side of safety, a mortgagee before selling usually gives his mortgagor, and any subsequent mortgagee, notice of what he proposes to do."

The defendants Bass acknowledged that letter on August 26, "We propose to sell these shares at 1*l.* each to Mr. F. R. Garrard, but before selling them we wish you to take the same steps with regard to advising Belton's trustees or others, as you did when selling for us other shares of the Welch Ale Brewery."

On August 27 the solicitors replied: "Although as explained in ours of the 18th inst. you are legally in a position to sell the shares without liability, unless you do so at an under-value, yet, in accordance with your wishes, we are giving certain notices viz. to the trustee in bankruptcy and to the solicitors for the Receiver in Lunacy. Feeling that if the notices are to be of any efficacy they must disclose all the material facts, we are mentioning the identity of the purchaser, and as the notices are being given, we are fixing a

fortnight as the period at the end of which you intend to effect the sale."

Notices were accordingly sent to the plaintiff's trustee in bankruptcy (he had been adjudicated a bankrupt in the previous year) and to the solicitors acting for a receiver who had been appointed in lunacy some time before.

On September 21, 1914, the board of the defendants Bass passed the following resolution: "Loan. B. J. Belton. 750 10*l.* shares of the Welch Ale Brewery, Ltd. Resolved that the above shares be sold to Mr. F. R. Garrard for the sum of 750*l.*, and that a loan for the amount be granted to him free of interest."

On September 28 Garrard wrote to Clay as follows: "I have completed the transfer and signed the promissory note connected with the purchase of the 750 ordinary shares of the Welch Ale Brewery, Ltd. There is no agreement with regard to the repurchase of these shares before May 1, 1917, to put the matter on the same footing as the option already given. To avoid the necessity of a legal document I suggest that you write me a letter to say that if I wish I can call upon Bass & Co. to repurchase."

On September 29 Clay replied: "With respect to the 750 Welch Ale ordinary shares which you are purchasing I am writing as arranged to say that we will repurchase them from you at the same price as you are giving, if requested by you to do so at any time before May 1, 1917."

On September 28, 1914, Garrard gave to the defendants Bass a promissory note expressed to be payable on demand for 754*l.* 5*s.* 6*d.*, free of interest. The odd 4*l.* 5*s.* 6*d.* represented stamps and transfer fees. The shares were transferred into Garrard's name; he was registered as the owner thereof in the books of the Welch Ale Brewery on October 9, 1914, and a new certificate was issued to him, which was deposited with the defendants Bass. In Garrard's private account book, under the heading "Assets December 31, 1915," there was an entry relating to the 750 shares in these words: "Certificate with Bass & Co. to secure whole of the money without interest to May 1, 1917." The entries in the books

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of the defendants Bass are set out in the judgment of Russell J.

In the interval between September, 1914, and May, 1917, the position of the Welch Ale Brewery improved materially. On April 30, 1917, Garrard discharged his indebtedness to the defendants Bass by a cheque of that date for 754*l.* 5*s.* 6*d.*

From 1917 to 1920, the financial position of the Welch Ale Brewery still further improved, and in 1920 Garrard sold the 750 shares for 28*l.* per share, thus realizing 21,000*l.* Prior to that date, the plaintiff's receiver in lunacy had been discharged, and his bankruptcy had been annulled.

The plaintiff commenced this action, alleging that the sale of the shares to the defendant Garrard was not a valid sale, and he claimed: (1.) a declaration that, notwithstanding the sale, the shares or their proceeds were still subject to redemption; (2.) redemption accordingly.

Romer K.C. and *Harman* for the plaintiff. If it had not been for Garrard's desire for an option the transaction of 1914 would not have been carried out. In 1914 Garrard never obtained anything more than an option. If there was a sale to him at all, it was in 1917. In any event these shares were never subject to the charge of 1909, and, therefore, when the moneys due under the charge of 1906 were paid off in 1913, any right the defendants Bass had to sell these shares disappeared. There was no power to consolidate these two mortgages, or if there was it only meant that the plaintiff could not redeem the mortgage of 1909 unless he redeemed the mortgage of 1906, but in fact the mortgage of 1906 no longer existed when this alleged sale took place. If there is a mortgage on property B in which s. 17 of the Conveyancing and Law of Property Act, 1881 (1), is not

(1) The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 17, enacts: "(1) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

"(2) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them."

excluded, and then a mortgage on property A in which the section is excluded, the mortgagor cannot redeem A without redeeming B, but he can redeem B without redeeming A. There must be an expression in both or one of the mortgages that s. 17 shall not apply to either. Here the section is only excluded from the mortgage of 1909. The decision in *In re Salmon* (1) is clearly wrong. In any event the doctrine of consolidation does not give a power of sale over property on which the loan has been paid off.

Tomlin K.C. and *Sheldon* for the defendants Bass, Ratcliffe & Gretton. If in fact there was a sale, it is quite immaterial what the motives were. If a mortgagee sells within his power and at the best price, his motive in selling cannot be impeached: *Nutt* v. *Easton* (2); *Kennedy* v. *De Trafford.* (3)

[RUSSELL J. referred to a passage in the judgment of Stuart V.-C. in *Robertson* v. *Norris.* (4)

Romer K.C. That passage is referred to by Kay J. in *Warner* v. *Jacob.* (5)]

It is stated in Fisher on Mortgages, 6th ed., 483, that that passage has been overruled in the case of *Nash* v. *Eads* (6), where Jessel M.R. said that Lord Eldon had never used the words attributed to him by Stuart V.-C.

In *Jones* v. *Matthie* (7) Cottenham L.C. deals with the point. There is nothing here to show that the transaction is, in law, anything but what it purports to be. If the shares had come back to the defendants Bass, they would not have taken them as mortgagees. If there is an ambiguity, patent or latent, in the deed, the parties can be examined in order to correctly interpret its meaning: *Watcham* v. *East African Protectorate.* (8) But here there is no reason for limiting the words "all other his share estate and interest under the said will and codicils" in the operative part of the deed of 1909. In order to find that these shares were not subject

(1) [1903] 1 K. B. 147.
(2) [1899] 1 Ch. 873, 877.
(3) [1897] A. C. 180.
(4) (1858) 1 Giff. 421, 424.
(5) (1882) 20 Ch. D. 220, 223.
(6) (1880) 25 Sol. J. 95.
(7) (1847) 11 Jur. 504.
(8) [1919] A. C. 533.

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to the charge of 1909, the Court would have to hold that the scope of these words was limited by the words in the recital. These shares, on the proper construction of the deed of 1909, are securities under that deed.

With regard to consolidation, the true view had been expressed in *Selby* v. *Pomfret.* (1) The matter had also been very fully dealt with in *Pledge* v. *White.* (2)

Clauson K.C. and *Spens* (*Stamp* with him) for the defendant Garrard. Once the shares had been sold, and sold at a proper price, the arrangements between the defendants Bass and Garrard had nothing to do with the plaintiff. To succeed on this part of the case, the plaintiff would have to prove fraud, and he does not even allege fraud.

The doctrine of staleness of demand applies in this case: *Brooks* v. *Muckleston.* (3) The mortgagor, with knowledge, has stood by since 1914, and allowed the mortgagee to deal with the shares. Now, after all this time, he comes forward and complains to the detriment of a third party.

With regard to consolidation the test is that if at a given moment a mortgagor has the right to redeem, and the mortgagee has the right to consolidate, then that position remains permanent. In neither the charge of 1906 nor the charge of 1909 is there a date fixed for repayment, and therefore the mortgagor could come and redeem at any moment, and the mortgagee could plead consolidation. *Pledge* v. *White* (2) applied the moment the transfer took place.

Romer K.C. in reply. If the plaintiff is right, all the moneys due under the 1906 charge had been paid off, and the defendants Bass were holding the securities as trustees for the plaintiff, subject to the doctrine of consolidation. To raise the question of delay, the defendants must plead estoppel, and there is no plea of estoppel here. The only person who had the right, between 1913 and 1920, to question these transactions between the defendants Bass and the defendant Garrard was the trustee in bankruptcy of the plaintiff, and it cannot be said that he knew anything about them.

(1) (1861) 1 J. & H. 336. (2) [1896] A. C. 187.
(3) [1909] 2 Ch. 519.

If the defendants' contentions are right, s. 17 of the Act of 1881 has not done away with the right of consolidation. That cannot be correct. Sub-s. 2 does not say that if the section is excluded from one mortgage, it is excluded from all mortgages. If a mortgagee gives an option over securities, he binds himself to sell them at a future date, and he cannot tell the value of the shares at the future date.

The plaintiff is entitled to succeed against both defendants.

Cur. adv. vult.

December 1. RUSSELL J. In this action the plaintiff complains of an alleged sale by the defendants Bass to the defendant Garrard of 750 ordinary shares of 10*l.* each in the Welch Ale Brewery. The alleged sale was made by the defendants Bass in the purported exercise of their powers as mortgagees of the shares. The plaintiff contends that the alleged sale was not a sale at all; that the transaction (when the facts are investigated and known) was mere machinery for the purpose of granting an option over the shares to Garrard (which the defendants Bass had been advised they could not grant); that the outward form of sale was observed merely to overcome the difficulty; and that the substance of the option remained, the transaction being one entered into for the purpose of conferring a benefit on the defendant Garrard. The plaintiff claims that the transaction cannot stand as against him; and that, the shares having been resold, he is entitled to the proceeds, less a sum for principal and interest payable to the defendants Bass.

The plaintiff further contends, if he is wrong upon this part of the case, that the defendants Bass had at the time of the alleged sale no power to sell the shares at all, and he claims similar relief upon this footing.

I will deal with the matter in the first instance upon the assumption that at the date of the alleged sale the defendants Bass had full power as mortgagees to sell the shares.

The alleged sale took place in 1914 at the price of 1*l.* per share. The defendant Garrard was at the time a director

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of the defendants Bass, and also a director of the Welch Ale Brewery, Ld. No complaint however is made, nor is any relief sought, based upon undervalue, or upon the position occupied by the purchaser. Full information before the sale was given to the plaintiff both as to the proposed price and the proposed purchaser.

The plaintiff's complaint is founded upon facts relating to the alleged sale subsequently discovered by him.

[His Lordship stated the facts relating to the transactions between the defendants and Garrard, and continued :]

As between the defendants Bass and Garrard the transaction in form was accordingly this : a sale by Bass to Garrard of the shares for 750*l.*, the purchase money to be payable without interest on May 1, 1917, secured in the meanwhile by a deposit of the share certificate and by a promissory note which on its face is expressed to be payable on demand ; the defendant Garrard to have the right at any time before May 1, 1917, to call upon the defendants Bass to repurchase the shares at the price of 1*l.* per share.

In the accounts as between the defendants Bass and the plaintiff the matter was dealt with in the following manner.

There appears at folio 26 of the defendants Bass' London Loans Ledger, an account headed "Belton and Hayward in account with Bass, Ratcliffe & Gretton, Limited." It relates to a loan in respect of which on June 30, 1914, 12,000*l.* was due for principal. On September 30, 1914, 750*l.* is placed to the credit of principal : "By transfer to Bn. amount advanced to Mr. F. R. Garrard as a loan." The balance due in respect of principal on June 30, 1915, is carried forward as 11,250*l.*, and the account continues on that footing until it is paid off and closed in January, 1920. This entry in the ledger was posted from the London Journal (folio 86) where the entry reads : "Sept. 1914 Bass & Co. Ltd. debtor to Belton & Hayward loan account for amount advanced to Garrard 750*l.*" In the Burton journal (folio 357) the entry reads : "September 29, 1914. F. R. Garrard to London Agency. Transfer from 12,000*l.* loan Belton & Hayward account B. J. Belton. 750*l.*" That entry is posted to the

Burton ledger (folio 368) to an account opened between Garrard and the defendants Bass to the debit of Garrard: "September 29, 1914. To London Agency Transfer ex 12,000*l.* Loan Account B. J. Belton. 750*l.*"

These entries appear at first sight somewhat of a mystery, and I am not sure that the evidence of the accountant and bookkeeper quite satisfactorily explains them. They were, however, the result of a letter written by the defendants Bass to their Burton accountant, Mr. Sibley, on September 29, 1914, which is in these terms: "As part of an arrangement we have agreed to make a loan of 750*l.* to Mr. F. R. Garrard, free of interest, and the amount is to be provided by transfer from Belton & Hayward's loan account. Will you please, therefore, debit a loan account to be opened in the name of Mr. F. R. Garrard with the sum of 750*l.* (free of interest), and credit London Agency, Loan 12,000*l.* Belton & Hayward (Account B. J. Belton) with the amount." The item 750*l.* nowhere appears in plain terms as a credit to the plaintiff of the proceeds of sale or the price of sale of the 750 shares. However, whether the form of bookkeeping adopted be normal or not, it is quite clear that as between the plaintiff and the defendants Bass, as from the date of their transaction with Garrard, the plaintiff's principal indebtedness was permanently reduced by 750*l.*, and he was only charged with interest on the principal sum so reduced.

I will add this. The defendants Bass had as security from the plaintiff 600 other Welch Ale Brewery shares, which had never formed part of his father's estate. These 600 shares they did not sell.

I have now, I think, fairly stated all the facts relevant to this part of the case, and no one, I think, can deny that the transaction of September, 1914, had for one of its objects a benefit to Garrard, that its terms were shaped so as to put Garrard (as he himself admitted) as far as possible on the same footing as if he had been granted the option which the solicitors had advised could not or should not be granted. That the transaction has resulted in an enormous profit to Garrard is evident. It must, however, be borne in mind

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that it is not alleged, and could not be truthfully alleged, that 1*l.* per share was an undervalue in September, 1914. It was not only a fair but a good price. As things then stood, the amount by which the plaintiff's indebtedness to the defendants Bass was in fact reduced represented more than the value of the shares at that time.

Can the plaintiff now complain of the transaction, go behind it, and claim the shares or the sum of 21,000*l.* which represents them, making good to the defendants Bass the sum of 750*l.* and interest, which upon this footing would still remain due to them on account of their loan? That is the question which I have to answer.

In form the transaction was a sale by a mortgagee, the whole of the purchase money being allowed to remain for a fixed period as a loan secured on the property sold, and the purchaser during that period having the right to put the property back on to his vendor at a price which was the amount of the original purchase money.

A mortgagee is entitled to sell at a proper price upon the terms of allowing a considerable portion of the purchase money to remain on mortgage. In the case of *Davey* v. *Durrant* (1), Knight Bruce L.J. uses the following language: "It was said that the arrangement by which part of the purchase money was suffered to remain on a mortgage of the property sold was such as to reduce the price, and was otherwise unjustifiable. But that arrangement appears to me to have increased rather than diminished the price, if the price was at all affected by it. Nor can I say that it is beyond the right or authority of a mortgagee with a power of sale to effect a sale, of which one of the terms shall be that even a considerable portion of the purchase money shall be allowed to remain on mortgage of the property, that mortgage being as between the seller and those entitled to the equity of redemption at the seller's risk; that is, he charging himself with the whole amount of the purchase money in account with them, as has been done in the present instance."

If this is correct I see no reason why the whole purchase

(1) (1857) 1 De G. & J. 535, 553.

money should not be allowed to remain on security: see *Bettyes* v. *Maynard* (1); *Thurlow* v. *Mackeson* (2); and *Farrar* v. *Farrars, Ld.* (3)

But as is pointed out by the authorities, the mortgagee must in account give the mortgagor full credit for the price. From the moment of the sale, however, the purchase money and the security, if any, for it, stand at the risk of the mortgagee. As between him and his mortgagor he is treated as having in fact received the full amount.

The fact that the mortgagee chooses to give to the purchaser the additional right of reselling the property to him can, in my opinion, make no difference. Such a right would certainly not tend to diminish the price which the purchaser would be prepared to give. If such right were exercised the property would not come back to the mortgagee in the capacity of mortgagee. The sale to the purchaser frees it from all right of redemption under the mortgage. It would come back to the mortgagee as a purchaser from an absolute owner, in whose hands the property was, subject to no right in third parties of redemption or otherwise.

Such being the form of the transaction of September, 1914, was the transaction in fact or in law anything but a sale as described?

So far as the test of fact is applied, unless I am to attribute to the defendants Bass and Garrard a fraudulent intent to conceal from their mortgagor their true actions and intentions, by resorting to forms and documents which outwardly meant one thing, but as between themselves were secretly to mean something wholly different, I am unable to say that there was in fact no sale to Garrard in September, 1914.

No fraud has been or could be alleged against the defendants Bass and Garrard, who have stated quite clearly in the minute books and correspondence the desire to give an option, the attempt to do so, the advice that they could not do so, and the substitution of the sale as a means to the same end.

(1) (1883) 31 W. R. 461. (2) (1868) L. R. 4 Q. B. 97.
(3) (1888) 40 Ch. D. 395.

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No other conclusion is possible than that in fact the shares were sold to Garrard in September, 1914.

That in law there was a sale cannot be doubted. Garrard became the legal owner and the registered holder of the shares. Subject to the security on them in favour of the defendants Bass, he was free to exercise the voting power in respect thereof, to receive any dividends which might be paid, and to dispose of the shares. The defendants Bass became his creditors for the purchase money, and except for their interest therein as security for that debt they had no right or title to the shares. So too as between themselves and the plaintiff, 750*l.* of his debt was wiped out, and they could never have asserted any claim in respect thereof. In law the transaction was a sale by the mortgagee, the purchaser becoming owner of the property sold, freed from all right of redemption by the mortgagor, the mortgagor ceasing to be indebted to the mortgagee to the amount of the purchase price of the property sold.

Thus the transaction was a sale by a mortgagee in exercise of his power of sale at a price admitted to be fair.

But then it is said that the mortgagee exercised his power of sale with an indirect motive, not with the view of realizing his security, but with the object of conferring a benefit upon the defendant Garrard by giving him an option masquerading as a sale.

No doubt the net result flowing from the transaction must be the same as the net result flowing from the grant of an option. Thus in the event which happened, on May 1, 1917, Garrard was the owner of the shares, having paid the 750*l.* fixed in September, 1914, just as he would have been the owner had he on May 1, 1917, exercised an option granted in September, 1914, and paid the purchase money. In the former case he retained an ownership commenced in September, 1914; in the latter case he would have acquired ownership on May 1, 1917. In each case he pays 750*l.* and no interest. Again had he exercised his right to resell the shares on May 1, 1917, the net result would have been the same as if an option period had expired and the option had

not been exercised. In the former case the defendant Garrard would have ceased to be owner of the shares, in the latter he would never have been the owner of the shares, and his right ever to become owner would have come to an end. In neither case would he have parted with any money.

Notwithstanding this identity in the ultimate positions of the parties, their respective legal rights and liabilities are throughout the period in question, wholly different according as the transaction is an option or a sale.

At one time there was colour for the suggestion that the motive of the mortgagee in selling might be weighed as an element in considering whether a mortgagee's power of sale had been or not validly exercised.

In *Robertson* v. *Norris* (1) Stuart V.-C. cited Lord Eldon as an authority in favour of the principle that the mortgagee is a trustee for the benefit of the mortgagor in the exercise of his power of sale, and added that if he used the power for any purpose other than to secure repayment of the mortgage, to effect other purposes of his own or to serve the purpose of other individuals, that would be a fraud on the exercise of his power, and the sale would be vitiated against the purchaser.

Sir George Jessel in the Court of Appeal would have none of this. The case is that of *Nash* v. *Eads*. (2) The Court consisted of Sir George Jessel, and Cotton and Lush L.JJ., and held that there was no foundation for this proposition. Sir George Jessel said: "The mortgagee was not a trustee of the power of sale for the mortgagor, and if he was entitled to exercise the power, the Court could not look into his motives for so doing. If he had a right to sell on June 1, and he then said, 'The mortgagor is a member of an old county family, and I don't wish to turn him out of his property, and will not sell it at present,' and then on July 1 he said, 'I have had a quarrel with the mortgagor, and he has insulted me; I will show him no more mercy, but will sell him up at once'—if all this was proved, the Court could not restrain the mortgagee from exercising his power

(1) 1 Giff. 421, 424. (2) 25 Sol. J. 95.

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of sale, except on the terms of payment of the mortgage debt. The Court could not look at the mortgagee's motives for exercising his power. Lord Eldon had never said anything of the kind which Vice-Chancellor Stuart supposed him to have said. The Vice-Chancellor was entirely mistaken, and must have been citing the judgments to which he referred from his recollection, without looking at the reports. Of course there were some limits to the powers of the mortgagee. He, like a pledgee, must conduct the sale properly, and must sell at a fair value, and he could not sell to himself. But he was not bound to abstain from selling because he was not in urgent want of his money, or because he had a spite against the mortgagor."

I am unable accordingly to inquire into the motives of the defendants Bass, or to hold that the sale is vitiated because they desired to confer a benefit on the purchaser by selling to him upon terms, which included a fair price.

In the result, I must come to the conclusion on this part of the case that in September 1914 the defendants Bass validly exercised their power of sale as mortgagees by selling the 750 shares to the defendant Garrard at a fair and proper price, and that the plaintiff has no cause of action in respect thereof.

There remains to be considered the plaintiff's contention that in September 1914 the defendants Bass had no power to sell the 750 shares at all. To render intelligible the points which are involved in this contention, it is necessary to state further facts which are relevant thereto.

[His Lordship then dealt with the plaintiff's title to the shares under the will of his father; the charges of 1906 and 1909; and the discharge by the plaintiff of the amounts due under the charge of 1906, and continued:]

The plaintiff contends that the 750 shares, although included in the charge of 1906, were not included in the charge of 1909. This is a question of construction. If he is right in this he contends that the defendants Bass had, in September, 1914, no power of sale over the 750 shares, because the security which comprised the shares had been

discharged, and the security which remained undischarged did not comprise the shares.

He further adds that the defendants cannot rely upon the doctrine of consolidation, because (1.) s. 17, sub-s. 1, of the Conveyancing Act, 1881, abolishes the right to consolidate, and there is in this case no contrary intention expressed within sub-s. 2 of s. 17; (2.) even if the right to consolidate existed, such right did not authorize the mortgagee to sell securities comprised in a mortgage which has been paid off in order to discharge a debt, due under a security which does not comprise the securities sold; and (3.) he is not seeking to redeem the charge of 1909, or, if he was, there is nothing to redeem in regard to the charge of 1906 which was paid off by February 7, 1913.

It is evident that these questions as to consolidation only arise if the 750 shares were not included in the charge of 1909. I now turn to consider the construction of that document.

The parcels are in the following words: [His Lordship then read the parcels]. What is charged by the first parcel is the plaintiff's one-fourth share of and in the assets forming the residuary estate then remaining undistributed and all other the plaintiff's share under the will already accrued or to accrue thereunder. These are wide words. The 750 shares were still registered in the testator's name. How could the plaintiff have established a right to have them transferred to him? Only by showing that a final and complete distribution should be made, and that on such distribution these shares would come to him as representing his share and interest of and in the undistributed assets, or his share and interest under the will.

The 750 shares represented part of the plaintiff's one-fourth share in the assets forming the residuary estate, and they were in fact then remaining undistributed.

In my opinion, situate as they were these 750 shares are within the words of the first parcels, and within both branches of it.

Are there any other words or expressions to be found in

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other parts of the document which will have the effect of cutting down or altering the prima facie meaning of the first parcels so as to exclude from them these 750 shares? It is said that such words or expressions are to be found. If so, they must be clear and strong enough for this purpose.

The recitals are relied upon. A recital of the plaintiff's title to one-fourth of the whole residuary estate subject to the annuities, is immediately followed by a recital that the residuary estate has been "divided" between the beneficiaries except the items of property specified in the first part of the first schedule thereto. Part I. of the first schedule contains as the items then representing the estate the assets which had been set aside to answer the annuities and nothing else.

It is contended that this shows an intention to charge under the first parcels only the items of property specified in Part I. of the first schedule. It is to be observed, however, that the first parcels make no reference to the schedule at all, and the word used in the parcels "undistributed" differs from the word "divided" used in the recital. There is, in my opinion, nothing in the recitals which would justify me in confining the first parcels to the items in Part I. of the first schedule.

Reliance was also placed upon subsequent provisions contained in the charge of 1909. The covenant to execute a legal mortgage in terms extends, and extends only, to the premises described in Part I. of the first schedule. There is no express provision which would include a legal mortgage of the 750 shares. So too as regards a later covenant as to costs and duty, which refers only to the premises in the first part of the first schedule, or to the premises described in the first schedule.

But I can get no real assistance from these provisions, which are from any point of view inaccurately framed, as they are not even confined to a share in the premises specified in Part I. of the first schedule, but impose an obligation to execute a legal mortgage of, and purport to charge, the entirety of such premises. To rely upon provisions so framed

for the purpose of cutting down or altering the phraseology of the parcels seems to me impossible.

I have purposely refrained from calling to my assistance in construing this document the conduct of those whose rights were governed by it. Indeed I would not, in my opinion, be justified in doing so in the present case, even upon the authority of *Watcham* v. *East Africa Protectorate.* (1) But it is some consolation to know that my view of the meaning of the words used in the charge of 1909 is not inconsistent with the practice which has openly been pursued by the defendants Bass in acting under it.

It is not disputed that if the charge of 1909 included the 750 shares, the defendants Bass were entitled to sell them in September, 1914.

In these circumstances the questions relating to consolidation do not fall to be decided.

The result is that the action fails and must be dismissed.

Solicitors for the plaintiff: *Withall & Withall.*

Solicitors for the defendants Bass, Ratcliffe & Gretton: *Routh, Stacey & Castle.*

Solicitors for the defendant Garrard: *Blundell, Baker & Co.*

(1) [1919] A. C. 533.

P. J. B.

C. A.
1922
May 12.

In re A DEBTOR.

[No. 199 of 1922.]

Bankruptcy—Receiving Order—Act of Bankruptcy—Non-compliance with Bankruptcy Notice—Scottish Order of Sequestration in Bankruptcy made before Act of Bankruptcy in England complete—Validity of Receiving Order—Jurisdiction—Bankruptcy (Scotland) Act, 1913 (3 & 4 *Geo.* 5, *c.* 20).

Where a bankruptcy notice had been issued and served upon the debtor requiring payment of a judgment debt, and the debtor, before the expiration of the time fixed for compliance with the notice, obtained, upon his own petition, an order of sequestration in Scotland, whereby all his assets became vested in the Scottish trustee:—

Held, that there was jurisdiction in the English Court to make a receiving order notwithstanding the sequestration, and, there being assets and creditors in England, such an order was properly made.

In re McCulloch (1880) 14 Ch. D. 716 followed.

In re Robinson (1883) 22 Ch. D. 816 distinguished.

Appeal from a receiving order made by the registrar in bankruptcy against the debtor on March 30, 1922.

On November 17, 1921, the petitioning creditors obtained judgment against the debtor for the sum of 1000*l*. The debtor having failed to satisfy the judgment debt, on January 25, 1922, the creditors issued a bankruptcy notice, which was personally served upon the debtor on January 30, 1922. The notice required compliance therewith before February 7, 1922. The debtor did not comply with the notice, but on February 4, 1922, he presented his own petition for sequestration in the Scottish Court, and on the same day an order of sequestration was made against him, and was followed by an act and warrant of confirmation dated February 21, 1922.

On February 7, 1922, a bankruptcy petition was presented against the debtor founded upon the act of bankruptcy committed by him in not having complied with the bankruptcy notice. Upon the hearing of the petition by the registrar it was contended that by reason of the Scottish sequestration the debtor could not comply with the terms of the bankruptcy notice, because the whole of his property had become vested in the Scottish trustee, and consequently he could not pay the

sum demanded by the notice. He had not therefore committed any act of bankruptcy. It was also contended, on the authority of *In re Robinson* (1), that the registrar ought not to exercise his discretion to make a receiving order having regard to the prior sequestration. The registrar held that the bankruptcy notice was rightly issued and served, and it was the debtor's own act which alone prevented his compliance therewith; he had therefore committed an act of bankruptcy by failing to comply with the bankruptcy notice before February 7. On the question of discretion, there were both assets and creditors in England which amply justified the making of a receiving order. There was evidence that in August, 1920, the debtor had voluntarily transferred to his wife certain shares belonging to him in a company. Under the Bankruptcy (Scotland) Act, 1913, there was nothing corresponding to the provisions of s. 42, sub-s. 1, of the Bankruptcy Act, 1914, dealing with voluntary settlements. Having regard to these facts and to the observations of the judges in *In re McCulloch* (2) and *In re Robinson* (1) the registrar thought he ought in the exercise of his discretion to make a receiving order.

The debtor appealed.

Tindale Davis for the appellant. The receiving order was wrongly made, because no act of bankruptcy has been committed by the debtor. During the currency of the bankruptcy notice—namely, on February 4, 1922—the order of sequestration was made in Scotland, and the debtor could not legally comply with the requirements of the notice, and consequently his non-compliance therewith did not constitute an act of bankruptcy. If, during the currency of a bankruptcy notice, something has intervened which prevents the debtor from legally complying with it he does not by non-compliance commit an act of bankruptcy. A receiving order cannot properly be made in England where an order for sequestration has been made by the Scottish Court. On the making of that order as from its date all the debtor's

(1) 22 Ch. D. 816. (2) 14 Ch. D. 716.

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property passed to the Scottish trustee, and the debtor could not pay the English petitioning creditors' debt: *In re A Debtor.* (1) There previously to the service of a bankruptcy notice the judgment creditor had himself committed an act of bankruptcy, upon which he was subsequently adjudicated a bankrupt, and it was held that he could not give a discharge for the judgment debt, and that a receiving order which had been made against the debtor must be discharged. The question is whether the debtor has been prevented from paying the judgment debt: *In re Sedgwick.* (2)

Where a debtor is by virtue of law prevented from committing an act of bankruptcy a receiving order cannot be made. It does not make any difference that the result is brought about by his own act. Further it is submitted that the sequestration having been granted there was no subsisting debt upon which the petition could be presented: Bankruptcy Act, 1914, s. 4: *In re Moss* (3); *In re Nelson.* (4)

Again the discretion of the registrar was wrongly exercised in making the order, and it ought to be rescinded: *In re Robinson.* (5) *In re McCulloch* (6) is against the appellant's contention on this point; but double bankruptcies are not to be encouraged: *In re Artola Hermanos.* (7)

Clayton K.C. and *E. W. Hansell* for the respondents were not called upon.

LORD STERNDALE M.R. I think that this appeal must be dismissed. The debtor appeals upon two grounds based upon want of jurisdiction, and a third alleging that the discretion of the registrar has been wrongly exercised. First, he says that he has not committed an act of bankruptcy because, between the serving of the bankruptcy notice and the time fixed for compliance therewith, his property has been sequestrated in Scotland and all his estate has passed to the trustee in the Scottish bankruptcy. In these

(1) [1912] 2 K. B. 533.
(2) (1888) 5 Morrell, 262.
(3) [1905] 2 K. B. 307, 314.
(4) [1918] 1 K. B. 459.
(5) 22 Ch. D. 816.
(6) 14 Ch. D. 716.
(7) (1890) 24 Q. B. D. 640, 644.

circumstances he argues that he was prevented by superior power from complying with the bankruptcy notice, and therefore has not committed any act of bankruptcy. In my opinion the answer of the registrar to that contention is complete. He says: "The bankruptcy notice was rightly served; the petition for sequestration was the debtor's own act. I am not aware that the debtor, by his own act, can prevent the operation of a bankruptcy notice." That answer seems to me to be amply sufficient to dispose of the first point. I do not wish to express any opinion whether if the petition had been presented in Scotland by a creditor the result might or might not have been different. But where the whole proceedings in Scotland have arisen through the debtor's own act I think he cannot avail himself of them in order to avoid proceedings properly constituted and perfectly regular in England. I think that *In re McCulloch* (1) is an authority to show that the point is a bad one. The next point is that although there was a failure to comply with the notice, yet, the sequestration having been granted, the petition was not founded on a proper still subsisting debt, and therefore the receiving order was not made upon a proper debt which the debtor can discharge. That, I think, is an entire fallacy. Although there is in the Bankruptcy (Scotland) Act, 1913, no prohibition section similar to s. 7 of the Bankruptcy Act, 1914, I think I may assume that the Scottish bankruptcy laws would not permit an action to be brought against a debtor after an award of sequestration, but that does not establish that proceedings cannot be taken in England, or that proceedings properly commenced in England cannot be continued. The last point is that the registrar has a discretion, and that he ought not to have exercised it by making the receiving order. Upon a question of discretion the registrar is probably in a better position to judge than we are, and I should myself always hesitate before interfering with the exercise of that discretion, but I must say that I think that the discretion here was quite properly exercised. It is true that in *In re Robinson* (2) the discretion was

(1) 14 Ch. D. 716. (2) 22 Ch. D. 816.

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exercised in the other way, but in that case there were no assets in England, and here there are. Also I believe it was foreshadowed in this case that the question of a voluntary settlement would have to be dealt with, and the bankruptcy law of Scotland does not contain the specific provisions with regard to voluntary settlements which are contained in our law. The appeal therefore fails on all points.

WARRINGTON L.J. I agree. I only desire to say on the first point that the fact that the petition for sequestration in Scotland was presented by the debtor himself seems to me to be fatal; but I must not be taken to intimate that my view would have been different if the petition had been presented by a creditor. That point may one day have to be decided.

YOUNGER L.J. I am of the same opinion.

Appeal dismissed.

Solicitors: *Lazarus & Son; Woolfe & Woolfe.*

G. A. S.

In re KEENE.

C. A.
1922
May 12.

Bankruptcy—Public Examination—Refusal to answer Question—"Property" of Debtor—Trade Secret—Formulas—Disclosure to Trustee in Bankruptcy—Partnership—Agreement not to disclose—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 50), *ss.* 15, 22, 25.

A debtor, against whom a receiving order had been made, had carried on business in the manufacture and sale in England, France and America of certain proprietary articles made according to secret formulas invented by him and his brother with whom he was in partnership. In his public examination he was required to disclose these formulas in writing to his trustee. The debtor and his brother had each of them agreed not to disclose the secret. Upon the dissolution of the partnership the bankrupt retained the assets and goodwill of the business in England and America, while his brother continued to carry it on in France. The formulas had never been committed to writing. The bankrupt refused to disclose them on the ground that they existed only in his brain as the result of his skill and capacity, and that to disclose them would be a breach of his agreement with his brother:—

Held, that the formulas were part of the goodwill and assets of his business, and that he was bound to communicate them to his trustee.

Appeal by the debtor from an order of Astbury J. directing him to disclose in writing to his trustee in bankruptcy the formulas for the making of certain proprietary articles, the manufacture and sale of which formed part of the business carried on by him, formerly in partnership with his brother, but now separately. When the partnership was dissolved it had been agreed that the debtor should carry on the business in England and America and the brother in France, and it had previously been verbally agreed that neither of them should disclose the secret formulas which were known to each of them, but had never been committed to writing. The trustee in bankruptcy was desirous of selling the goodwill and assets of the debtor's business, but could not do so unless the secret formulas were disclosed. The debtor in his public examination had refused to disclose them, and the registrar reported his refusal to Astbury J., who made the order appealed from. The debtor contended that the formulas did not form part of his property, but existed in his brain as the result of his skill and capacity, and he was not bound

C. A. 1922 KEENE, *In re.*

to disclose them, nor could he do so without breaking his agreement with his brother, which the Court would not compel him to do.

Beyfus for the appellant. There was no power in the Court to make this order of disclosure. It is practically an order compelling the debtor to communicate his personal skill and capacity. The secret formulas are only existent in his brain and he cannot be compelled to disclose them.

Further the Court of bankruptcy is a Court of equity and will not compel a person to reveal something which he has contracted not to disclose. The trustee relies upon ss. 15, 22 and 25 of the Bankruptcy Act, 1914. It is submitted that the case does not come within either of those sections. The order is made on the ground that the trustee is entitled to ask questions as to the debtor's conduct, dealings or property. The formulas do not form part of the debtor's property. Supposing the debtor were a medical specialist who had discovered a cure for cancer, the trustee could not compel him to disclose his secret. *In re Armstrong* (1) shows that there is a distinction between property and power. In that case it was held that a married woman could not be ordered to exercise a general power of appointment over settled property in favour of her trustee in bankruptcy. If the debtor is compelled to disclose the formulas he will be breaking the agreement which he entered into with his brother with whom he was in partnership. The whole value of the business lies in the secrecy of the formulas. Each brother relied upon the other not to disclose the secret. This is a Court of equity, and if the bankrupt is ordered to disclose the Court ought to impose a term that the secret should not be communicated to any one who could use it in France, to the injury of the debtor's brother who carries on the business in that country.

Hansell for the trustee. The order is rightly made. The question is whether these formulas form part of the bankrupt's assets. It is submitted that they do, and that it is the

(1) (1886) 55 L. J. (Q. B.) 578, 579.

duty of the bankrupt under s. 22 to assist the trustee in their realization. *In re Stevenson* (1), where the debtor submitted to answer the question at a private examination, does not afford assistance in this case.

Beyfus in reply.

LORD STERNDALE M.R. [after stating the facts:] The bankrupt has been ordered to answer certain questions the answer to which will disclose the secret contained in these formulas. The formulas were not written down and it is said that they remained in the brain of the bankrupt, and so did not constitute "property" as the word is used in the various bankruptcy Acts. In my opinion that is not right. The formulas were for the manufacture of certain articles which had been made in accordance with them for years. The manufacture and sale of the articles made according to the formulas formed an appreciable part of the business carried on by the bankrupt. The Court has had illustrations as to when trade secrets of this kind are property transferable to the trustee in a bankruptcy, and when they are not. I do not propose to deal with those illustrations. It seems to me these formulas form part of the assets or goodwill of the business, and therefore I think that the debtor must answer these questions, and disclose the formulas.

But then it is said that, even so, the Court ought not to order him to answer questions so as to disclose matters which he was under agreement not to disclose. It is said that when the formulas were invented there was an agreement between the bankrupt and his brother, which still exists, that the secret should not be disclosed to any one, though the evidence as to such an agreement was rather loose. It was not exactly a restrictive covenant, but it was a covenant, and it was entered into at a time when the brothers were carrying on business together in partnership. In 1918 the partnership was dissolved, and the business was divided according to territories. One brother, the bankrupt, took England and the United States, and the other took France. It was agreed that in each territory the

(1) [1918] W. N. 159.

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business with the goodwill, assets, book debts, etc., should become the sole property of the brother to whom that territory was allotted. I think that in all probability the brothers intended not to remain bound by the agreement as to non-disclosure, because if they were so bound to secrecy neither brother could sell his part of the business to any purchaser, and therefore in this instance the business in England and America would not have become the sole property of the debtor, as it is admitted that it did. I think therefore the second contention fails, and that the appeal should be dismissed.

WARRINGTON L.J. I am of the same opinion. With regard to the first point. I can see no objection to the debtor being asked to disclose these formulas. It is said that what he is being asked to disclose is his own personal skill, and that it is not the subject of "property" within the meaning of the bankruptcy law. In my view what he is being asked to disclose is certain facts and particulars in connection with the manufacture of these proprietary articles. Whether the facts are known to him and not written down or whether they are written down, to my mind, makes very little difference.

As to the other point it is said that the order is wrong, because the debtor cannot comply with it without breaking his agreement with his brother. The brother is not before the Court and of course our decision will not preclude his taking any remedy he may have; but we must express our view upon the construction of the deed, and in my opinion the dissolution of the partnership put an end to the agreement as to non-disclosure of the formulas. Each brother after the dissolution became absolute owner of that part of the business which was carried on in his own particular territory, with the goodwill, book debts and trade assets. The alleged implied agreement appears to contradict the written agreement between the parties, and in my view, cannot be upheld. I agree that the appeal should be dismissed.

YOUNGER L.J. Upon the first point I am entirely of the

same opinion. Upon the second, I think that if the debtor answers the questions in compliance with the order no obligation to his brother will be broken by him.

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Appeal dismissed.

Solicitors: *Lawton & Taylor; Edward H. Coopman.*

G. A. S.

C. A. 1922 *May* 18.

In re CHAPMAN.

HALES *v.* ATTORNEY-GENERAL.

[1921. C. 2438.]

Will—Construction—Residuary Gift—Charitable Purposes—Absence of Trust—Sole Executor—Discretion of Executor as to Objects and Purposes—"At his own disposal"—Executor Trustee for Next of Kin.

A testatrix by her will appointed an executor, and after giving various pecuniary legacies, including two for charitable purposes, and 100*l.* to her executor, she left in blank the name of her residuary legatee. By a codicil the testatrix desired that her residue should be "applied for charitable purposes as I may in writing direct, or to be retained by my executor for such objects and such purposes as he may in his discretion select, and to be at his own disposal." She left no written directions as to the charities to be benefited:—

Held, (1.) that no good charitable trust was declared, the executor having a discretion to devote the residue to objects and purposes other than charitable; (2.) That the trust for those objects and purposes was too indefinite for the Court to execute; and there being no direct gift to the executor, the added words "to be at his own disposal" were not sufficient to enable the Court to hold that the executor took the residue beneficially. He held it therefore as trustee for the next of kin.

Decision of Eve J. [1922] 1 Ch. 287 affirmed.

In re Howell [1915] 1 Ch. 241 distinguished.

APPEAL from the decision of Eve J. (1)

By her will dated October 2, 1911, Matilda Augusta Chapman, spinster, appointed her solicitor, the plaintiff William Henry Hales, to be one of her executors (the name of the other executor being left in blank) and directed her said executors to pay her debts and funeral expenses, and then, after bequeathing various pecuniary legacies to relations and

(1) [1922] 1 Ch. 287.

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friends, she gave a legacy of 200*l.* to the vicar for the time being of Trinity Church, Little Queen Street, Holborn, for the benefit of the poor of the parish, one of 100*l.* to the Church Army, and to each of the executors who should prove her will and act in the administration of the estate a sum of 100*l.*; and as to the rest, residue, and remainder of her estate and effects she gave and bequeathed the same to ——. The will contained also a declaration that her executor thereunder being a solicitor should be entitled to charge and be paid all professional or other charges for business done by him or his firm in connection with the trust.

By a codicil made on January 17, 1920, the testatrix purported to dispose of her residuary estate as follows: "Subject to the payment of the legacies given by my will and all duties, the residue of my property I desire applied for charitable purposes as I may in writing direct, or to be retained by my executor for such objects and such purposes as he may in his discretion select, and to be at his own disposal." The testatrix died on November 11, 1920, and the will and codicil were proved by W. H. Hales as sole executor on December 4, 1920. No written directions by the testatrix as to the charitable purposes referred to in her codicil could be found. The statutory next of kin of the testatrix were two cousins, the defendants Margaret MacGee, widow, and Maria Delany, the surviving children of the testatrix's deceased aunt, Elizabeth Maria Delany. On May 30, 1921, W. H. Hales took out an originating summons for the determination of the following questions:—

(1.) Whether, upon the true construction of the will and codicil, the residue of the testatrix's property was, in the events which had happened, applicable for such exclusively charitable purposes as the executor might in his discretion select?

(2.) If that question was answered in the negative, whether the residue of the testatrix's property

(*a*) was to be held by the executor in trust for her statutory next of kin, or

(*b*) belonged to the executor beneficially?

Eve J. held (1.) that, inasmuch as, in the events which

had happened, there was a discretion in the executor to devote the residue to objects and purposes other than charitable, no good charitable trust was declared; and (2.) that the trusts for those objects were too indefinite for the Court to execute; and there being no direct gift of the residue to the executor, the added words "and to be at his own disposal" were not sufficient to enable the Court to hold that the executor took the residue beneficially; he therefore held it in trust for the next of kin.

The executor appealed.

Courthope Wilson K.C. and *Nutter* for the appellant. The appellant does not contend that there is no good charitable trust. But as between himself and the next of kin, it is submitted that he takes the residue beneficially. He relies upon the words "and to be at his own disposal": *In re Howell* (1); Theobald on Wills, 7th ed., p. 487. In *In re Maxwell's Will* (2) the words were: "To be disposed of as (my son) should think proper." See also *Williams* v. *Arkle*. (3) Whether a person is to take as an executor or trustee only, or to have a beneficial interest under a will, is a question of intention, to be ascertained from the words of the will itself. In the Court below *Vezey* v. *Jamson* (4) was relied upon for the next of kin.

[LORD STERNDALE M.R. That case does not afford much assistance.]

Dighton Pollock for the Attorney-General. The real intention of the testatrix is charitable. The word "such" in the codicil means "the like." *Pocock* v. *Attorney-General* (5) is very like this case.

It is not reasonable to suppose that the testatrix having started with the idea of giving her residue to charity should abandon that intention and give the property to her executor to whom she had previously given a legacy. She merely substitutes the discretion of her executor for her own in the selection of the charitable objects to be benefited. The

(1) [1915] 1 Ch. 241.
(2) (1857) 24 Beav. 246.
(3) (1875) L. R. 7 H. L. 606, 614.
(4) (1822) 1 S. & S. 69.
(5) (1876) 3 Ch. D. 342, 347.

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direction that the property is to be retained by the executor shows that he is to deal with it himself in the manner indicated by the testatrix—i.e., for charitable purposes.

J. G. Wood for the next of kin. The charitable gift in the codicil fails by reason of the absence of any written instructions by the testatrix. It is suggested that the gift is for such charitable objects as the executor may select, but under the terms of the codicil the objects need not be charitable and the gift is too undefined for the Court to give effect to it. That being so the executor does not take beneficially. Where a legacy is given to the executor such a disposition as this will not be construed as conferring a beneficial interest upon him. He takes the residue as a trustee for the next of kin: *Hunter* v. *Attorney-General.* (1) The words "and to be at his own disposal" make no difference. *In re Howell* (2) is distinguishable. In that case there was a gift of the residue to the executor in terms.

Courthope Wilson K.C. in reply.

LORD STERNDALE M.R. This appeal turns entirely upon the construction of a very few words in the testatrix's will, and it is difficult to see exactly what her words mean. I am not sure that the judgment I am going to give will carry out what she wished, but if it be the fact that it does not carry out what she wished to do it is because she has not used words such as she ought to have used for her purpose. I think we get into a dangerous region if we begin to speculate as to what we think the testatrix wished to convey by her words. We can only look at the words and see what we think in the best of our judgment they do in fact mean. [The Master of the Rolls read the will and codicil and continued:] The first question is whether the gift of the residue is a charitable gift. I am not at all sure that the testatrix did not wish it to be so, but in my opinion Eve J. was right in saying that applying the ordinary principles of construction that meaning cannot be got out of the words. It is a strange thing no doubt that she should have given the residue to such charitable purposes as

(1) [1899] A. C. 309. (2) [1915] 1 Ch. 241.

she might in writing direct, or to such purposes, which might be not charitable, as her executor might select. It is curious that she should have put a fetter upon herself, as to the objects, that she did not put upon him, but in my opinion the words she has used have that effect. I do not think this case stands upon the same footing as *Pocock* v. *Attorney-General.* (1) The will in that case did not contain any such words as "for such objects and such purposes as he may in his discretion select," and reading it, as I think it must be read, I think it comes to this, that the lady leaves the residue to be applied for such charitable purposes as she may in writing direct"—that is what she meant—"or"—that is the alternative—"to be retained by my executor for such objects and such purposes as he may in his discretion select." I think that expression, "such objects and such purposes," is not confined to charitable purposes; it certainly is not in the literal construction of the words, and I think it would be forcing the construction too far to read into those words, "such objects and such purposes," the word "charitable" from the former part of the gift. Therefore I think there is not a good gift for charitable purposes.

Then the next question is, if that be so, is it a bequest to the executor beneficially or not? If it be not to him beneficially but only upon trust then, there being no valid trust, he holds the residue for the next of kin, and Eve J. has so decided. I have had some difficulty about this, but upon the whole I have come to the same conclusion as Eve J. There seems to me to be an atmosphere, if I may so call it here, of devoting this residue to something apart from the personal purposes of anybody. I do not rely very much upon that, but I rely simply upon the words, because if I relied upon the other I should be getting again into the region of speculation. The words are "I desire applied for charitable purposes as I may in writing direct or to be retained by my executor for such objects and such purposes as he may in his discretion select and to be at his own disposal." That does not seem to me to be a direct gift to him beneficially. If the property

(1) 3 Ch. D. 342.

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does not go to charitable purposes in consequence of the testatrix not having given her directions in writing—it was her view that it would be valid for her to direct in writing—then it is "to be retained by my executor." It has been laid down, and I do not wish to controvert it in the least, that, in the construction of a document, a gift to an executor must be construed in the same way as a gift to anybody else, but when the word "retained" is used it seems to me not to be an apt word to convey a direct gift to the executor, it looks very much more like "to be retained by my executor, in his character of executor," and it is to be retained "for such objects and such purposes as he may in his discretion select and to be at his own disposal"; and I read those last words as if they were "and to be at his own disposal for such purposes." We were very much pressed by, and I feel the difficulty of, the decision in *In re Howell* (1), but I think as Eve J. thought, that that case is capable of being distinguished. It is very near this case, but the words are not the same. The words there were "After the aforesaid legacies have been duly paid the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal." There is a material difference between those words and the words here. The latter are, "to be retained by my executor for such objects and such purposes as he may in his discretion select." Those words "to be retained by my executor" do not appear in *In re Howell* (1), but when it is said by the learned judge there "Those words 'at his own disposal' afford the key to the construction of the gift," it must not be taken that wherever those words occur in any other will they necessarily show that the gift is to be construed as a beneficial one.

For these reasons I think the learned judge's judgment is right, though I admit the question is one of some difficulty. I think the appeal should be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. [His Lordship referred to the terms of the will and continued:] I

(1) [1915] 1 Ch. 241.

pause there for one moment. There is no gift to the executor at all. He takes simply virtute officii, and if the matter had stopped there there is certainly not only no indication of an intent to benefit the executor personally, but there is every indication that the testatrix had no such intention, and of course also if matters had stood there there would have been no question whatever that the residue would have been undisposed of and would have passed to the next of kin. She lived for seven years after making that will, and never made any codicil or any other disposition which could supply the blank that had been left in the gift of the residue. Some few months before her death however, in January, 1920, she made a codicil obviously intending to supply that blank, and it is the codicil, read of course in connection with the will, which we have to construe. [His Lordship read the codicil and continued:] Two questions are raised, first, whether the objects and purposes which the executor may select are restricted to charitable purposes. If they are not so restricted then the executor's discretion would enable him to apply the residue for objects other than charitable, and there would be no good charitable gift. The second question which arises is whether, assuming that there is no good gift for charitable purposes, the executor is entitled to take beneficially. With regard to the first point, whatever guess or conjecture we may make as to what the testatrix meant, we are confined, in ascertaining, as a matter of law, what was her intention, to the words she has used. The words she has used are: "The residue of my property I desire applied for charitable purposes as I may in writing direct." If she had given any direction in writing confined to charitable purposes, and if that direction had been attested as a codicil, which alone would get rid of the legal difficulty, then the executor's duty would have been to apply the residue for those charitable purposes. But she gives no such direction. Then the testatrix, contemplating the possibility of her giving no such direction, gives an alternative direction, and that direction is that the estate is to be retained by the executor. He has got it virtute officii, he is to retain it, and he is to retain it for

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Warrington L.J.

such objects and purposes as he may in his discretion select. That is perfectly simple. There is nothing in those words which would restrict the executor to objects which are, in law, regarded as charitable. He might, under those words—and I can see nothing in the codicil which would render it unlawful for him to do so—pay a part of the moneys retained by him to any individual person whom he might think it right to benefit, or give it to some purpose which, though not charitable within the legal interpretation of that term, is a benevolent purpose. If I am right in saying that the testatrix gave that discretion to the executor which would include objects and purposes not charitable, then it is quite clear that there is no good charitable gift. I cannot see my way to read the objects and purposes which are placed in the discretionary selection of the executor as confined to the charitable purposes which she has mentioned. She has shown no intention of restricting the discretion of the executor in any such way. With regard to the first point, therefore, I think Eve J. was right.

I now come to the second point: Is the executor intended to take beneficially? If he is to take beneficially the testatrix must, by this codicil, have had an intention different from that which she had when she made her will. The first, and I think a very important, point to be noticed is that the estate is to be retained by the executor. There is no gift to the executor at all. It comes to him virtute officii, and in no other capacity. It is to be retained by him, and it is to be retained for certain objects and purposes. I am clearly of opinion that when the testatrix directs her executor to retain for certain objects and purposes to be selected by him she is pointing to objects and purposes external to himself. It is impossible to suppose that if she intended that the executor should retain the property for his own benefit she would direct that it should be retained for objects and purposes to be selected by himself. It seems to me the objects and purposes pointed at are external to himself. The objects and purposes are to be selected by him at his discretion. So far, there is nothing said as to what he is to do with those portions

of the property when he has selected the objects and the purposes, except that they are to be for those objects and purposes. She therefore adds to the discretion of selection, which she has given him, the power of disposing of the property, by the words, "at his own disposal," and I think that those words must be read to mean: "at his disposal amongst the objects and purposes which he selects." The result of that is that he has a right not only to select the objects and purposes, but to dispose of the property amongst them in such way as he may think fit. In my opinion that gives a much more natural construction to the will than that which would impute to the testatrix the intention that the executor, to whom no gift has been made, is to retain the property for his own benefit. Like the Master of the Rolls, I have been somewhat puzzled by *In re Howell* (1), which undoubtedly comes very near the present case, but in my opinion it is clearly distinguishable when it is carefully examined. In the first place, as was pointed out by the only two of the judges in the Court of Appeal who gave their reasons for their judgment in *In re Howell* (1), there was no trust at all imposed upon the executor, either expressly or by implication, with regard to the residue of the estate. The words there were: "The residue of my property (if any) shall be at the discretion of my executor, and at his own disposal," and, as was pointed out by Lord Cozens-Hardy M.R. and Swinfen Eady L.J., there was no trust whatever imposed upon the executor. That seems to me to be one very material distinction, and, further than that, there were no words, such as there are here, pointing to objects and purposes external to the executor. It was simply to be at his discretion, and at his disposal. What the judges there said was that giving to those words their natural interpretation, they led to the conclusion that he might dispose of the estate for his own benefit, and if he had that discretion then it was, in effect, to give him a beneficial interest.

For these reasons I am of opinion that the judgment of Eve J. was correct, and ought to be affirmed.

(1) [1915] 1 Ch. 241.

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YOUNGER L.J. I accept the conclusion which has been arrived at in this case by my Lord, the Lord Justice, and the learned judge, but I do so with the same hesitation and reluctance that has been expressed by my Lord. Of one thing I think there can be no doubt. The intestacy which results from the conclusion at which we have arrived is the very last thing that this testatrix ever intended, or expected, but that does not, of course, justify the Court in saying that an intestacy has not resulted if, upon the true construction of the words which the testatrix has used, such is the necessary consequence. Apart from that, my hesitation in arriving at the conclusion at which I have ultimately arrived may be explained in this way: If the two branches of this codicil are to be read, as Mr. Dighton Pollock asks us to read them, together, I do find a difficulty in saying that there is not here a good charitable gift. If, on the other hand, they are to be read separately I find a difficulty in saying that there is not an absolute gift to the executor. Now if you read them together I think the codicil may be fairly paraphrased in this way, and before going further I would observe that the codicil was made, apparently, when the testatrix was in a nursing home where she had been, apparently, for some years, and was witnessed by two of the nurses. It may, therefore, have been made at a moment when death was apprehended. Now in that state of things this codicil may be fairly paraphrased in this way: I desire to have the residue of my property applied for such charitable purposes as I may in writing direct, and if I do not so direct, or give any direction, then I desire that the residue of my property shall be retained by my executor for such objects and such purposes, being charitable, as he may, in his discretion, select, and to be at his own disposal without any direction in writing from me; that is to say, he is to be the person substituted for the testatrix as the person who is to give the direction with reference to the charitable destination of her residue. But, I agree, there is a difficulty in giving that construction to the codicil, so reading the two limbs of it together. The words "for such objects and such purposes" in the later are so

different from the expression "for charitable purposes" in the earlier part of the codicil as to make it difficult for a Court of construction to limit them to charitable purposes and thus make the gift in the alternative a valid charitable gift. The second suggested construction is to read the two parts quite separately, and to read the second part as if it were, by itself, a clear alternative in default of the first, and if you do that, then, apart from the fact that the gift is a gift, if it be a gift to a person described as "my executor," and apart from the word "retained," which I feel, with my Lord, primarily indicates retention as executor, I do not think it would be seriously disputed that the words would suffice to carry an absolute interest; that is to say, if the gift had been in favour of somebody who was not an executor, even if it had been phrased in the same words, it would be an absolute gift. The difficulty is to say that it is not such a gift merely because it is to a person described as "my executor," and because the word "retained" is used. That difficulty is expressed by the late Master of the Rolls in *In re Howell* (1), where he says that a gift of this kind is to be construed, although in favour of an executor, exactly on the same principles as if the gift were made in favour of somebody else. However I have arrived at the conclusion that the use of that word "retained," which my Lord attached such importance to, and to which, if I may respectfully do so, I desire to attach a like importance, is sufficient to require us to say that there is not, in this second alternative of the codicil, enough to enable a Court of construction to hold that a beneficial gift to the executor is intended. Accordingly, although with the reluctance that I have previously expressed, I accept the conclusion that the learned judge has arrived at in this case.

Appeal dismissed.

Solicitors: *W. H. Hales; The Solicitor to the Treasury; Sayer, Ledgard & Smith.*

(1) [1915] 1 Ch. 241.

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RUSSELL J.
Jan. 27.
C. A.
May 18, 22.

HANSON *v.* RADCLIFFE URBAN DISTRICT COUNCIL.

[1922. H. 233.]

Education—Non-provided School—Teacher engaged by Managers—Notice of Dismissal and Offer of Reappointment by Local Education Authority at lower Salary—Notice whether "on educational grounds"—Right of Teacher to sue—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 5, 7, *sub-ss.* 1 (*a*), (*c*), 3, 4, 7.

In 1917 the plaintiff was engaged as an uncertificated assistant teacher by the managers of a non-provided school under an agreement whereby she was to be paid a salary in accordance with the scale then in force in the district. In December, 1921, defendants, who were the local education authority, directed the managers to give their teachers one calendar month's notice to terminate their agreements and to offer to reappoint them at reduced salaries. The managers refused to give the notices directed and thereupon the defendants gave the plaintiff notice to terminate her agreement with the managers. In an action by the plaintiff for a declaration that the notice was invalid and inoperative:—

Held, by Russell J. and the Court of Appeal, (1.) that the notice was not given "on educational grounds" within the meaning of s. 7, sub-s. 1 (*a*), of the Education Act, 1902, and was therefore invalid; (2.) that the defendants having by their action made themselves parties to the contract between the plaintiff and the managers, the plaintiff had a right to come to the Court for relief and was entitled to the declaration claimed.

Martin v. *Eccles Corporation* [1919] 1 Ch. 387 approved and followed.

MOTION.

The plaintiff was an uncertificated assistant teacher under an agreement with the managers of the St. Andrew's Church of England School at Radcliffe in the county of Lancaster, a non-provided school. The agreement was dated January 31, 1917, and was made between three of the managers and the plaintiff. By clause 1 it was provided that the teacher should teach and serve as an uncertificated assistant teacher as from September 11, 1916, in accordance with the requirements of the Board of Education, and under the direction as to secular instruction of the local education authority, and subject thereto under the direction of the managers, and should give religious instruction to the children and pupil teachers as provided by s. 7, sub-s. 6, of the Education Act, 1902.

Clause 3 provided that her salary was to be "in accordance with scale, unless the Local Education Authority otherwise decide, with a proportionate part for services rendered for less than a calendar month." Clause 5 provided that the agreement might be terminated "on the last day of any month, except the holiday month of August, by either of the parties hereto, on giving to the other of them one calendar month's previous notice in writing to that effect as and from the last day of each month, and, if such notice be given by the managers it shall be given in accordance with the decision of a meeting convened by due notice to be given to every manager before such meeting, such notice to state that the termination of the agreement with the teacher will form part of the business of such meeting." The defendants, as the local education authority, duly consented to the appointment of the plaintiff, and agreed to pay her salary in accordance with scale.

In September, 1920, new scales of remuneration were recommended and adopted by various education authorities as a consequence of the recommendations of a committee which sat under the presidency of Lord Burnham. One of these scales was that known as the Burnham Standard Scale No. 3. If the Burnham Standard Scale No. 3 applied to the plaintiff, she would receive a smaller remuneration than she would receive under her existing agreement. On December 19, 1921, a resolution, subsequently confirmed and adopted by the District Council, was passed by the education committee of the local authority that "directions be given to the managers of schools to give one calendar month's notice, to expire on January 31, 1922, to terminate the agreements with those teachers in their respective schools who are adversely affected by the operation of the Burnham Standard Scale 3 as modified by the report of the Associated Local Education Authorities for Lancashire and accepted by the Board of Education, and that the Secretary prepare (*a*) the form of notice and (*b*) a form of acceptance by the teacher of reappointment on new terms as from February 1, 1922, and forward the same, together with an explanatory letter,

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to the correspondents of schools; and, further, if the managers of any school fail to carry out such direction, that this authority carry out the said direction as if they were the managers of the school." In pursuance of that resolution, certain documents were sent out. One was sent to the managers of the plaintiff's school. It was dated December 22, 1921, and was addressed to the correspondent of the school, and was as follows: "Dear Sir, I am instructed by the Radcliffe education authority to advert to the conference which the school management sub-committee had with the correspondents or other representatives of the non-provided schools in the Urban District last evening, when questions were considered affecting the bringing into operation of a new salary scale for teachers, known as the Burnham Standard Scale 3, which has been adopted by the local education authority, having regard to the attitude of certain classes of teachers who will be adversely affected thereby. It was explained that the Radcliffe Authority is a member of the Associated Local Education Authorities for Lancashire, and this body appointed a standing joint committee to recommend the appropriate standard scale of salaries which should be adopted for the county. The standing joint committee, which comprises representatives of the local education authorities and teachers, after having made special representations to the Board of Education, by letter and subsequently at interview, to modify the scale as far as it adversely affected the uncertificated teachers, especially, but without success, ultimately recommended the Associated Local Education Authorities to adopt the Standard Scale 3 as set out in the Burnham Report, subject to certain modifications therein as the Board of Education had agreed to accept. The Associated Local Education Authorities accepted and approved of the standing joint committee's report, and recommended each local education authority in the county to adopt the scale referred to, and, as stated above, it has been adopted by the Radcliffe Authority. The scale dates from April 1, 1921, but, as regards these teachers adversely affected by its operation,

it has been agreed by the local education authorities that no refund of overpayment should be required to October 31, 1921. The Radcliffe Committee, with a view of facilitating the operation of the scale, had an interview with certain teachers whose salaries were adversely affected by the scale, on November 29, and desired them to accept the salary, payment to be made on the following day for the month of November, subject to adjustment on the new scale, but they declined to agree, and the Authority, therefore, are compelled most reluctantly to proceed in a formal manner to terminate the engagements of such teachers, in order to bring the said scale into operation. This will mean, if notices are issued this month, that the new scale cannot operate before February 1 next at the earliest." Then there were set out various clauses in the teachers' agreement. The managers were requested to note that one calendar month's previous notice in writing was required, and attention was called to other formalities necessary to be observed on the part of the managers. The letter concluded as follows: "As the notices are given 'by the direction of the Authority' the notices should be in the form submitted. I enclose herewith appropriate forms of (1.) notice, and (2.) undertaking of teacher to accept new scale from February 1 to be sent to each teacher, and if managers will hold their meetings and sign the notices, and return them to me not later than noon on the 30th inst. I will see that they are duly forwarded to the teachers concerned." Enclosed therein were the forms to be sent by the managers. The one addressed to the teacher was as follows: "I forward herewith the formal notice of termination of agreement of your office as teacher," etc. The other was a formal resolution: "By direction of the local education authority for the Urban District of Radcliffe, and in pursuance of a resolution passed by the managers of the —— school at a meeting duly held and convened, authorising me, as chairman of the meeting, so to do, I hereby give you one calendar month's notice to terminate your agreement," etc. Enclosed therewith was the form to be signed by the teacher: "I, the undersigned, am willing to

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accept reappointment as teacher in your school on the same terms and conditions as obtained in my agreement with you on January 31, 1922, except as to salary, and I hereby undertake to accept a salary ascertained, according to my status, on the basis known as the Burnham Scale 3, with such modifications as now made or may be made by the Associated Local Education Authorities for Lancashire, with the approval of the Board of Education." The managers of the school at which the plaintiff was employed, on receiving these documents, considered them at a managers' meeting, and on December 30 they wrote to the local education authority in these terms: "Dear Sir, At a managers' meeting duly convened to consider the matter of the Burnham Scale 3, and its application to the teachers of these schools, the following resolution was carried: 'That the managers, acting on legal advice, regret that they cannot comply with the directions given by the local education authority in this matter.'" Thereupon the local education authority, purporting to act under powers conferred upon them by the Education Act, 1902, communicated with the teachers. The letter addressed to the plaintiff was: "Dear Madam, I forward herewith the formal notice of termination of agreement of your office as teacher in the St. Andrew's Church of England School, together with form of undertaking to be signed by you if you desire to accept reappointment on the revised terms. You are aware that this procedure is rendered necessary to secure the operation of the Burnham Scale 3, adopted by the local education authority. It would be a great convenience to the managers and authority if you would state whether you intend to accept reappointment on the revised terms on or before January 16, 1922." The notice was in these terms: "The managers of the St. Andrew's Church of England School having intimated to the local education authority for the Urban District of Radcliffe their failure to carry out the direction given by the said authority to terminate your engagement with the said managers as a teacher in their school, the said local authority, in pursuance of powers conferred upon them in that behalf, do hereby

give you one calendar month's notice to terminate your engagement with the said managers as a teacher in the said school, such notice to expire on January 31, 1922." Enclosed therewith was also a form to be signed by the teacher as before, indicating her willingness to accept reappointment as a teacher in this school on the modified scale. The plaintiff refused to accept this notice, and subsequently commenced the present proceedings, whereby she asked (1.) for a declaration that the notice given by the defendants was invalid and inoperative, and that her engagement with the managers was unaffected thereby; and (2.) for an injunction to restrain the defendants from acting upon such notice.

The motion was heard before Russell J. on January 27, 1922.

Preston K.C. and *W. G. Hart* for the plaintiff. The whole question in this case turns on s. 7 of the Education Act, 1902. (1) The only point is whether the notice of dismissal

(1) Education Act, 1902, s. 7, sub-s. 1: "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with:—

"(*a*) The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds; and, if the managers fail to carry out any such direction, the local education authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers; but no direction given under this provision shall be such as to interfere with reasonable facilities for religious instruction during school hours;

"(*c*) The consent of the local education authority shall be required to the appointment of teachers, but that consent shall not be withheld except on educational grounds; and the consent of the authority shall also be required to the dismissal of a teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school."

Sub-s. 3: "If any question arises

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was given on "educational grounds" within the meaning of sub-s. 1 (*a*). A refusal to accept a salary fixed by an outside authority cannot be an educational offence. A local education authority exercising its power, under sub-s. 1 (*a*), to dismiss a teacher is acting in a quasi-judicial manner. The resolution under which the defendants acted in the present case showed a pre-determination to dismiss the plaintiff, which was wholly unjudicial. This case is governed by *Martin* v. *Eccles Corporation*. (1) Unless the dismissal was on "educational grounds," the defendants had no power to dismiss the plaintiff.

[They also referred to *Blanchard* v. *Dunlop* (2) and *Mitchell* v. *East Sussex County Council*. (3)]

Clauson K.C. and *Timins* for the defendants. In all the cases that have been referred to there has been a direction by the local authority to dismiss on educational grounds. Here there is no question of dismissal on educational grounds, or any personal question, or any question of offence on the part of the teacher in any shape or form. The only thing is that the educational authority have come to the decision that it would be for the benefit of education that the Burnham Scale should be adopted. The local authority have complete control in all matters of secular education, and in all matters of finance. The position here is that the local authority have bona fide come to the conclusion that in order to conduct secular education in this school on a satisfactory basis a certain scale of salary shall be in force, and that the services of those teachers who are not prepared to accept such scale of salary

under this section between the local education authority and the managers of a school not provided by the authority, that question shall be determined by the Board of Education."

Sub-s. 4: "One of the conditions required to be fulfilled by an elementary school in order to obtain a parliamentary grant shall be that it is maintained under, and complies with, the provisions of this section."

Sub-s. 7: "The managers of a school maintained but not provided by the local education authority shall have all powers of management required for the purpose of carrying out this Act, and shall (subject to the powers of the local education authority under this section) have the exclusive power of appointing and dismissing teachers."

(1) [1919] 1 Ch. 387.

(2) [1917] 1 Ch. 165.

(3) (1913) 109 L. T. 778.

shall be dispensed with; a matter of educational policy, purely and simply. The arguments advanced on behalf of the plaintiff would cut down the control of the local authority in matters in which they are responsible—namely, finance. It is true that the salaries are fixed by contracts between the managers and the teachers, but the local authority have control of finance.

Crocker v. *Plymouth Corporation* (1) shows that a teacher cannot maintain an action for salary against a local authority, but that does not say that it is not within the power of a local authority to give directions in matters of finance.

The plaintiff here has rights only against the managers; she has no rights against the defendants. She is seeking a declaration that as between the managers and the defendants, the defendants have done something illegal. There is no legal relation between the plaintiff and the defendants.

[RUSSELL J. Parliament has given the defendants statutory power to terminate the contract between the plaintiff and the managers. Cannot the plaintiff then bring an action against them ?]

The defendants are only using the names of the managers to give a notice.

[RUSSELL J. The notice is not in that form.]

The power given to the defendants is to carry out the direction as if they were the managers. In other words, the defendants exercise the power on behalf of the managers, and in their names as if they were the managers. The defendants cannot act on the notice.

[They also referred to *Harries* v. *Crawfurd* (2); *Young* v. *Cuthbert* (3); and *Smith* v. *Macnally*. (4)]

Preston K.C. in reply. All the authorities in which it has been held that a teacher has no right of action have been decided under s. 7, sub-s. 1 (*c*). The only authority in regard to sub-s. 1 (*a*) is *Martin* v. *Eccles Corporation*. (5) Sect. 7 is for the protection of teachers. The action of the defendants is

(1) [1906] 1 K.B. 494.
(2) [1918] 2 Ch. 158.
(3) [1906] 1 Ch. 451.
(4) [1912] 1 Ch. 816.
(5) [1919] 1 Ch. 387.

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purely financial, and has nothing to do with "educational grounds." The plaintiff will be content with a declaration in the terms asked for.

RUSSELL J. This is a motion which the parties have agreed to treat as the trial of the action. The matter is one of urgency, because if relief is to be granted, it ought to be granted before the 31st of this month. The plaintiff is a teacher employed by the managers of a non-provided school, St. Andrew's Church of England School at Radcliffe in Manchester. She has been employed by the managers of that school for the past five years, but recently she has been dismissed from her employment. She has not been dismissed by the managers, but she has been dismissed by the local education authority under a notice dated December 30 last. The relief she claims in this action is, in the first place, a declaration that the notice purporting to terminate her engagement with the managers is invalid and inoperative, and that her engagement under her contract with the managers is not affected thereby. She also asks for an injunction.

The first question I have to consider is whether there was power in the local education authority to dismiss the teacher on the ground, and solely on the ground, that she refused to accept a revision of her salary. The section which deals with this matter is s. 7 of the Act of 1902. I think I ought also to read s. 5, because it contains a provision which may be of relevance. Sect. 5 of the 1902 Act is in these terms: "The local education authority shall, throughout their area, have the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870 to 1900, and any other Acts, including local Acts, and shall also be responsible for and have the control of all secular instruction in public elementary schools not provided by them; and school boards and school attendance committees shall be abolished." Sect. 7 is a long section, and is composed mainly of the conditions and provisions to be complied with by a non-provided school for the purpose of obtaining the benefit of its maintenance and being kept efficient by the

local education authority. The section has been considered in many cases, and I will refer only to the relevant parts of it: [His Lordship read the provisions of s. 7 and continued:] There has been no contest in this case, and there could not be in view of the cases which have already been argued and decided in the Courts, that sub-s. 7 in referring to the power of dismissing a teacher, includes the case of the termination of a contract of employment of a teacher in accordance with the terms of that contract. It does not refer merely to summary dismissals for misconduct or anything of that sort. Further, the section contemplates that the contract of employment of the teacher is a contract between the teacher and the managers. They are the parties to the contract, but in the circumstances indicated in the section there is to be a power in the local education authority to dismiss, and, to use the language of Younger J. in one of the cases to which I shall refer in a moment for the purpose of dismissal, the local education authorities are made statutory parties to the contract. What is equally clear is this, that unless the case falls within the provisions of the section, there is no power of any sort or kind in the local education authority to terminate a contract entered into, not with them, but with somebody else altogether.

The first question which arises is this. As I read s. 7, sub-s. 1 (*a*) and sub-s. 7, there is no power in the local education authority to dismiss her except "on educational grounds." The question is whether the ground of dismissal in this case—namely, the desire to alter her salary—is an educational ground within the meaning of this statutory provision. There is very little assistance in the way of authority upon that point, but one does get some guidance from the language used by Phillimore L.J. in *Mitchell* v. *East Sussex County Council.* (1) The Lord Justice used this language: "What the plaintiff tries to set up very indirectly is that there were not sufficient educational grounds to warrant such a notice, but when it is said that a teacher is to be dismissed on educational grounds, comparing that with

(1) 109 L. T. 778, 780.

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s. 7, sub-s. 1 (*c*), of the Act of 1902 on grounds connected with the giving of religious instruction, it means that the motive must be educational. It is educational as distinct from religious, as distinct from political, as distinct from moral—so far as moral can be separated from educational—and as distinct from social. The only power of the local education authority to interfere with the managers is when for educational grounds they think the teacher should be dismissed." I know of no other case where one gets any assistance as to the meaning or trend of those words "educational grounds," but it does appear to me that it is not an educational ground when the sole desire is to reduce the salary. In my opinion an educational ground must be a ground connected in some way with the qualifications either of the individual, or the class of teacher to impart instruction, or a desire on the part of the local education authority that certain instruction ought not to be imparted—something of that kind—but the mere desire to economise does not, in my opinion, entitle the local education authority to terminate the employment of a teacher, alleging that to be an educational ground. This is a very strong provision which enables a person not a party to the contract to determine the employment under that contract. It appears to me to be a provision the conditions of which must be strictly fulfilled before the power can be said to arise at all. It is put by Mr. Clauson that this is really only another way of giving a direction as to the secular instruction to be given in the school. In my opinion it is no such thing. It is a direction the effect of which is to dictate to the managers what remuneration they should pay to the persons employed by them. It is quite true, and I am not overlooking the fact, that the remuneration has ultimately to be paid by the local education authority, but the local education authority can protect itself perfectly well against any undue extravagance under other provisions in the section. They could refuse, if they thought an undue sum was being asked from them by way of remuneration, to pay it, and thereupon the matter could be referred to and determined by the Board of Education under sub-s. 3 of s. 7. It

appears to me that this is an attempt to do in an indirect way what they are not entitled to do in a direct way; that is to fix the remuneration which has to be agreed to be paid to those whom the managers, and the managers only, employ. Accordingly, if there was nothing else in the case, I should hold that this notice was inoperative for the purpose of terminating this employment.

But then it is said, even if the local education authority be wrong in what they have done, nevertheless this action does not lie; there is no cause of action as between the teacher and the local education authority. The authorities in regard to that are in a peculiar position. The point really is this: whether the rights which appear to be given to a teacher under s. 7 are rights which the teacher can enforce as between himself, or herself, and the local education authority, or whether they are merely safeguards which are enforceable as between the managers and the local education authority. Let me give an instance of what I mean. Take s. 7, sub-s. 1 (*c*), where it is provided that the consent of the local education authority shall be required to the appointment of teachers, and that that consent shall not be withheld except on educational grounds. If the case arose where the managers were willing to appoint A. B., and the local education authority refused their consent on educational grounds, could A. B. complain of that, or would the only persons who could complain of it be the managers? Some cases have arisen under the provisions of sub-s. 1 (*c*). The first one, I think, was the decision of Buckley J. in *Young* v. *Cuthbert.* (1) Subsequently the same matter arose for consideration by Warrington J. in *Smith* v. *Macnally* (2), and the two learned judges took different views. The matter came in another shape before the Court of Appeal in *Blanchard* v. *Dunlop* (3), where it was hoped that those two conflicting views might be resolved, but the Court of Appeal did not decide between those two conflicting views; they disposed of the appeal without having

(1) [1906] 1 Ch. 451. (2) [1912] 1 Ch. 816.
(3) [1917] 1 Ch. 165.

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so to do. The view of Buckley J. in *Young* v. *Cuthbert* (1) was supported by Peterson J. in *Harries* v. *Crawfurd.* (2) Finally the matter came before Younger J. in *Martin* v. *Eccles Corporation.* (3) I refer to Younger J.'s judgment because he reviewed the authorities, and his is the latest decision upon the point. [His Lordship stated the facts in *Martin* v. *Eccles Corporation* (3) and read the judgment of Younger J., pp. 402 to 405, and continued:] That is the state of the authorities, and what am I to do in the present case? It is a matter of some difficulty; it is certainly a question of doubt, but the most recent decision is this decision of Younger J. It appears to me at present that I ought to follow it. It is said that the learned judge there was wrong in saying that the Court of Appeal in *Mitchell's Case* (4) decided the point when they did not do so. True it is they did not in terms decide it, but certainly the language used by Phillimore L.J., and by Swinfen Eady L.J., appears to me to involve the proposition that had there been in fact no educational grounds existing in that case the Court could, and would, have interfered in the direction sought for by the plaintiff. The result is that in the present case the notice which the local education authority caused to be served upon the plaintiff was an ineffectual notice, because the circumstances the existence of which were necessary to give rise to the power did not exist. It further appears to me, following the views of Younger J., that the plaintiff is entitled here to sue, and to have that fact established by the declaration of the Court. It would be strange were it otherwise. This is a statute enabling a person not a party to the contract to put an end to the contract against the wishes of both parties to it. It would be strange in those circumstances that both or either of the parties to the contract should not be able to come to the Court and have it established that this statutory power has been wrongfully exercised, or rather that the circumstances giving rise to the statutory power

(1) [1906] 1 Ch. 451.
(2) [1918] 2 Ch. 158.
(3) [1919] 1 Ch. 387.
(4) 109 L. T. 778.

did not in fact exist, so that the purported determination of the contract was in fact no determination at all.

The question then remains what relief should I grant. The writ and the notice of motion both ask for an injunction. Mr. Clauson has pointed out certain difficulties that would arise in the way of enforcing the injunction. He used those difficulties more for the purpose of accentuating his argument upon the question whether there was any cause of action or not. I do not apprehend for a moment that the local education authority would act in any way otherwise than in accordance with the Court's decision. Accordingly for the present the only relief I propose to grant is to make a declaration. The declaration asked for in the writ is a declaration that the notice served by the defendants upon the plaintiff dated December 30, 1921, purporting to determine her engagement with the managers, is invalid and inoperative, and that the engagement of the plaintiff under her contract with such managers is unaffected thereby. That appears to me to be a proper and correct declaration to make in the present case. Accordingly, the parties having agreed to treat the hearing of the motion as the trial of the action, there will be a judgment containing that declaration, and, of course, the defendants must pay the costs of the action.

P. J. B.

C. A.

The defendants appealed. The appeal was heard on May 18, 22, 1922.

Clauson K.C. and *Timins* for the appellants.

Preston K.C. and *W. G. Hart* for the respondent.

The arguments were substantially the same as those used in the Court below. In addition to the cases there cited the following were referred to: *Dyson* v. *Attorney-General* (1); *Dyson* v. *Attorney-General.* (2)

LORD STERNDALE M.R. This appeal raises an important question, and I think the judgment of Russell J. was right. I should have said that the point was a short one, if it had not taken the best part of two days to argue.

(1) [1911] 1 K. B. 410. (2) [1912] 1 Ch. 158.

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My decision may be stated shortly. The plaintiff was an uncertificated teacher in a non-provided school under an agreement with the managers. After the date of the agreement the Burnham scale of salaries was introduced. Its general effect was to increase the salaries of the teachers, but in the case of certain uncertificated teachers its effect was to reduce them. In the case of the plaintiff its effect was slightly to reduce her salary. The defendants, the local education authority, determined to put in force the Burnham scale and that scale had been accepted by the managers of nearly all the non-provided schools in their district. The managers of this particular school however refused to accept it. It is not for me to express an opinion whether that refusal was reasonable or not. All I have to say is whether what was ordered to be done by the local education authority was legal or not. I entirely appreciate the point taken at the opening of the appeal that the decision of this Court may not compel the local education authority to pay the higher salaries in a case, like the present one, of a non-provided school; it may be that they will be able to throw the burden upon the managers. That is a matter for the local education authority to consider.

When the plaintiff refused to accept re-engagement upon the lower terms, and the managers refused to give the notice of dismissal, the local education authority took the step of giving notice under s. 7, sub-s. 1 (*a*), of the Act of 1902, and they say that they have dismissed her on "educational grounds." I am unable to follow that contention. It is true that it was suggested on the construction of that sub-section there were two grounds laid down for the management of these schools, grounds connected with the giving of religious instruction and educational grounds, and it was said that where action was taken not on grounds connected with religious instruction it must be on educational grounds. It was also said that finance was not an unimportant factor in education, as in other things, and that it was highly important on educational grounds that the same scale of salaries should prevail in all the schools in the district. But

I cannot put my conclusion in better words than Russell J. put his in the Court below, where after referring to *Mitchell* v. *East Sussex County Council* (1) he said: "I know of no other case where one gets any assistance as to the meaning or trend of those words 'educational grounds,' but it does appear to me that it is not an educational ground when the sole desire is to reduce the salary. In my opinion an educational ground must be a ground connected in some way with the qualifications either of the individual, or the class of teacher to impart instruction, or a desire on the part of the local education authority that certain instruction ought not to be imparted—something of that kind—but the mere desire to economise does not, in my opinion, entitle the local education authority to terminate the employment of a teacher, alleging that to be an educational ground." I entirely agree with those words. I also entirely agree with what was said on that point by Younger J. in *Martin* v. *Eccles Corporation*. (2) In my opinion, therefore, the first point fails.

I think therefore that we must approach the case on the footing that the local education authority have exceeded their powers in purporting to determine this agreement. But it was said that the plaintiff was not entitled to come here and ask the Court whether the determination of the agreement was rightful or wrongful, because s. 7 of the Act dealt only with the position as between the local education authority and the managers. I should have thought myself that the local education authority would have been glad to obtain a decision of the Court upon the matter but apparently they do not take that view.

The matter depends upon s. 7 of the Education Act, 1902. Sub-s. 1 (*a*) of the section provides: "The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds; and, if the managers fail to carry

(1) 109 L. T. 778. (2) [1919] 1 Ch. 387.

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out any such direction, the local education authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers . . . ." The power of the local education authority to dismiss teachers comes in in an oblique way. Sub-s. 1 (*c*) provides: "The consent of the local education authority shall be required to the appointment of teachers, but that consent shall not be withheld except on educational grounds; and the consent of the authority shall also be required to the dismissal of a teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school." The result of that sub-section is that in a school of this kind the managers are the only persons to appoint and dismiss teachers subject to the power given by sub-s. 1 (*a*) to the local education authority to require the managers to dismiss on educational grounds. I cannot imagine that a teacher who has been wrongfully dismissed is not entitled as of right to come to the Court and have it determined whether the persons giving the notice have acted wrongfully. I think the language of Younger J. in *Martin* v. *Eccles Corporation* (1) correctly expresses the position in which a local education authority are placed by the section. He says: "The intervention of the authority in this case is not under that sub-section (i.e., s. 7, sub-s. 1 (*c*)) but is under s. 7, sub-s. 1 (*a*), and it amounts to positive action on their part. They have directed the dismissal of Miss Martin on 'educational grounds,' and, the managers having failed to carry out that direction, they have exercised the power thereby given them 'themselves to carry out the direction as if they were the managers,' by giving her notice determining her contract. That is to say, being made, as it were, for this purpose statutory parties to Miss Martin's contract, they have given her a notice which they are only entitled to give 'on educational grounds.' Clearly, therefore, I should have thought Miss Martin on whom that notice has been served is entitled to challenge its validity by showing that no such grounds existed." I think that is a very

(1) [1919] 1 Ch. 387, 403.

accurate description of the position, and if that be right it is hopeless to argue that the plaintiff in this case has no right to come to the Court. I do not propose to decide whether she would have a right to bring an action for wrongful dismissal, but I think she is clearly entitled to come and ask whether the defendants have done right.

Further, the defendants are a statutory body, which has purported to interfere with a contract made between two parties, and I adhere to my judgment in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1), in which, although I had the misfortune to disagree with Lord Wrenbury, I said that a number of declarations had been made, and, in my opinion, rightly made, as to the rights of parties under contracts, without waiting for some event to happen, as, for instance, for a ship to arrive at its destination, in order to determine the result of the contracts and what the exact causes of action might be. In my opinion, under Order XXV., r. 5, the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide. I think that the order of Russell J. was also right on this point, and that the appeal should be dismissed.

WARRINGTON L.J. Sect. 7, sub-s. 1 (*a*), of the Act of 1902 provides that "The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds; and, if the managers fail to carry out any such direction, the local education authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers." The local education authority in this case have purported

(1) [1915] 2 K. B. 536.

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to act on that power. They directed the managers to give notice to the plaintiff of dismissal. The managers did not comply with that direction and the local education authority thereupon purported to dismiss the plaintiff themselves.

The first question is: Was that dismissal a dismissal "on educational grounds" within the sub-section? If it was not then the discretionary power of the local education authority to dismiss the plaintiff never arose. On that point I have nothing to add to what has been said by the Master of the Rolls and Russell J. In my opinion, the dismissal was not on educational grounds.

The second question is perhaps of more general importance. It is: Has the Court any jurisdiction to interfere? There has been a great deal of discussion as to the jurisdiction of the Court, and, in my judgment, the decision in this case will not finally settle the controversy raised by the conflicting decisions in *Young* v. *Cuthbert* (1) and *Smith* v. *Macnally*. (2) Here, this local education authority, believing themselves clothed, by s. 7, with the personality of the managers, have purported to determine their contract with the plaintiff. It seems to me that if they really are clothed with that personality they become in effect parties to that contract, and I think therefore that it is without question a case in which this Court has a right to make a declaration. Here is a public body, entitled under certain circumstances to interfere with the rights of other persons. It does so with no authority. It seems to me it would be nothing short of a disaster if the Court had no power to make a declaration upholding the rights of those other parties, and restraining that wrongful interference.

I agree that the appeal should be dismissed.

YOUNGER L.J. I am entirely of the same opinion.

Solicitors for appellants: *Shaen, Roscoe, Massey & Co.*

Solicitors for respondent: *Hamlins, Grammer & Hamlin, for R. Clayton, Radcliffe.*

(1) [1906] 1 Ch. 451. (2) [1912] 1 Ch. 816.

W. I. C.

In re WALTON'S SETTLEMENT.

WALTON *v.* PEIRSON.

EVE J.
1922
June 21, 22.

[1922. W. 35.]

Settlement—Husband and Wife's Funds—Annuity for Wife—Deed of Revocation—Cancellation—Mistake.

By a settlement of the funds belonging to a husband and wife it was agreed that it should be lawful for the funds to be sold and the proceeds invested in the purchase of an annuity in the joint names of husband and wife, with benefit of survivorship; and if the annuity should not be purchased the whole of the funds should, in the event of the death of the husband in the lifetime of the wife, be vested in the wife and the executors of her husband upon trust to invest the same in the purchase of a life annuity for the sole and separate use of the wife. The settlement contained a power for either party to revoke it. Upon the death of her husband his widow, who was an old lady, desired to avoid the necessity of purchasing the annuity. Upon the advice of her solicitor, who did not appreciate that the widow, being solely entitled to the annuity when purchased, could call for a transfer of the capital applicable for its purchase, she executed a deed poll revoking the settlement. In an action against the executors of her husband's will she claimed to be entitled to the funds settled by her husband, or alternatively the cancellation or rectification of the deed of revocation:—

Held, following *Walker* v. *Armstrong* (1856) 8 D. M. & G. 531, 544, that the plaintiff's solicitor having gone beyond his instructions in ignorance of the true legal position of the plaintiff, there would be a declaration that she was absolutely entitled to the investments representing her husband's fund, and an order for the cancellation of the deed poll.

ACTION WITH WITNESSES.

By an indenture of settlement dated September 16, 1912, made between James Walton (the late husband of the plaintiff Elizabeth Anne Walton) of the one part, and the plaintiff of the other part, the parties covenanted and agreed that certain investments therein mentioned belonging to James Walton and specified in the first part of a schedule thereto (the husband's fund) and certain other investments to which the plaintiff was entitled in her own right and specified in the second part of the same schedule (the wife's fund) should, during the joint lives of James Walton and the plaintiff, remain in their then state of investment, but it should be

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lawful for James Walton and the plaintiff, jointly in respect of the wife's fund and J. Walton alone in respect of the husband's fund, to sell and convert into money all or any part of the said respective funds and to invest the net proceeds thereof either in the purchase of an annuity in the joint names of J. Walton and the plaintiff, with benefit of survivorship, or at the discretion of J. Walton in any other mode of investment to be held upon the trusts of the settlement, and during the joint lives the income of the respective funds was applicable as therein mentioned; and the settlement provided that if the annuity should not be purchased, then in the event of the death of J. Walton in the lifetime of the plaintiff, both the husband's fund and the wife's fund should vest in and be held by the plaintiff and the executors of her husband's will upon trust to invest the whole of the said funds and investments then remaining subject to the trusts of the settlement in the purchase for the sole and separate use of the plaintiff of a life annuity from some responsible and well-known life office, such annuity to be paid to and received by the plaintiff for her sole and separate use; and the settlement contained a proviso that it should be lawful for J. Walton and the plaintiff at any time by deed or deeds, wholly or partially to revoke and make void the said settlement and the trusts and provisions therein declared.

J. Walton died on October 31, 1920, having by his will dated October 26, 1920, appointed the defendants, John Edmund Peirson and John William Connolly, his executors. During his life J. Walton converted into money part of the husband's fund and reinvested the same. On his death the plaintiff, who was an old lady of seventy, desired that the funds and investments subject to the trusts of the settlement should not be invested in the purchase of an annuity for her, but that, in lieu thereof, the funds and investments should be held for her sole use and benefit and be payable and transferable to her. Upon the advice of her solicitor, Mr. Brewer, and to effect this purpose, she executed a deed poll on April 28, 1921, by which in pursuance of the power contained in the settlement she revoked and made void the settlement of

September 16, 1912. The plaintiff now contended that by virtue of the deed poll the settlement funds became the property of the plaintiff free from the trust to invest in the purchase of an annuity, but the defendants contended that the effect of the deed poll was to determine the interest of the plaintiff in the husband's fund which now formed part of his estate. If that was the effect of the deed the plaintiff said that the deed was executed by mistake and in ignorance of its true meaning and effect. The plaintiff accordingly claimed a declaration that the investments at the death of J. Walton subject to the trusts of the settlement now belonged to the plaintiff absolutely, free from the trust to invest in the purchase of an annuity. Alternatively, a declaration that the deed poll ought to be cancelled or rectified so as to give effect to the intention of the plaintiff that the funds in question should belong to her absolutely, and that the defendants might be ordered to transfer the investments constituting the husband's fund to her.

Evidence was given by Mr. Brewer to the effect that at the time when he advised the plaintiff to execute the deed of revocation he did not appreciate the true legal position of the plaintiff and thought the best way of getting rid of the trust to invest in the purchase of an annuity was for the plaintiff to execute a deed revoking the settlement.

F. Baden Fuller for the plaintiff. A deed can be rectified or reformed if proved not to have carried out the intention of the party executing it. The solicitor here did not appreciate at the time the full effect of the deed poll and exceeded the instructions given to him by the plaintiff, her only object being to get rid of the provision in the settlement for the purchase of an annuity for herself. There have been similar cases of mistakes by solicitors being rectified: *Daniel* v. *Arkwright* (1) and *Walker* v. *Armstrong*. (2) The latter is a strong case in the plaintiff's favour.

Hodge for the defendants. The solicitor had two modes of doing what was required by the plaintiff and he selected one

(1) (1864) 2 H. & M. 95. (2) 8 D. M. & G. 531, 544.

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the consequences of which he knew and contemplated as appears from one of his letters. The husband's fund should therefore revert to his estate. The defendants as executors were bound to oppose this action on behalf of their beneficiaries. In *Walker* v. *Armstrong* (1) the only thing required was to rectify a clear mistake in a document. The solicitor's instructions there were limited to a particular act, and he went beyond them and otherwise altered the provisions of a settlement.

EVE J. [after stating the material trusts of the settlement continued :] It is not surprising that the widow, aged seventy at the date of her husband's death, was desirous, if possible, of preventing the trust funds being applied in the purchase of an annuity, and she so stated to her friend and solicitor, Mr. Brewer. After considering the matter he came to the conclusion, and so advised her, that the only way in which she could give effect to her wishes was by exercising the power of revocation contained in the settlement. Accordingly, when he was instructed to do what was necessary to avoid the purchase of the annuity, he prepared and the plaintiff in due course executed, the deed of April 28, 1921, which she desires to get rid of by this action. The effect of that deed was to put an end to the settlement for all purposes, and as a result the settled fund representing the husband's contribution reverted to his estate, and that representing the wife's contribution reverted to her. Mr. Brewer gave evidence and frankly assumed full responsibility for what has been done. His instructions were to avert the necessity of purchasing the annuity, and he admits that he did not at the time appreciate that the plaintiff, being solely entitled to the annuity when purchased, was in a position to call for a transfer to her of the capital applicable for its purchase. He did not in fact appreciate the legal position ; he thought that in some way or another the trust for the purchase of the annuity must be got rid of and that the only course open was the exercise by the plaintiff of the power of revocation. Afterwards

(1) 8 D. M. & G. 531.

he realized that the deed might have a more far reaching effect than either he or the plaintiff had contemplated. Hence this action, the evidence in which discloses this state of things —the client desirous only of putting an end to the trust for the purchase of the annuity and so instructing her adviser— the solicitor, in temporary forgetfulness of the fact that the trust could be determined by a simple instruction to the trustees, preparing a deed which not only puts an end to the particular trust but revokes all the trusts of the settlement, and allowing the client to execute it without appreciating that it does a great deal more than give effect to her instructions. Can the client in these circumstances be held bound by the deed ?

I think the case to which my attention has been called— *Walker* v. *Armstrong* (1)—is very good authority for saying she cannot. Turner L.J. says: "I feel no doubt that the deed of 1840 went beyond the instructions, and beyond the intention of the parties, and what then is the consequence ? The very principle of this Court in correcting instruments is, that the parties are to be placed in the same situation as they would have stood in if the error to be corrected had not been committed, and, adopting this principle, the will must in this case be supported." He then goes on to deal with an argument addressed to him by Mr. Rolt and says: "The respondent's argument throughout rested on this basis, that this is a case in which there were two modes of doing the same thing, and that it was left to the solicitor to determine which mode should be adopted, and that he adopted the mode which is in question. But this argument seems to me fallacious. The answer to it is, that to correct the mistake was one thing, and that to correct the mistake and do a great deal more was another, and that the latter course and not the former was adopted." That is exactly what has happened in this case. The solicitor was instructed to get rid of the trust for the purchase of an annuity and he drew this deed which not only gave effect to his instructions but went far beyond what the plaintiff intended. I think the case is

(1) 8 D. M. & G. 531, 544.

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entirely within that authority, and I must give the plaintiff the relief she claims. The executors of the husband's will have acted quite properly in defending the action on behalf of their beneficiaries and their costs must be provided for. The judgment will declare that the trust funds subject to the settlement at the death of James Walton belonged absolutely to the plaintiff free from any trust to invest the same in the purchase of an annuity and will order cancellation of the deed of April 28, 1921, and, subject to the retention of their costs of the action to be taxed as between solicitor and client, will direct the defendants to transfer to the plaintiff the investments constituting the husband's fund.

Solicitors: *Brewer & Son; Rollit, Sons & Compston.*

G. M.

SARGANT J.
1922
May 24, 25.

FOWLER *v.* WILLIS.

[1921. F. 2432.]

Landlord and Tenant—Lease—Tenant's Option to purchase—"All the estate interest and title" of Landlords—Exercise of Option—Equity of Redemption vested in Landlord—Tenant's Claim to unencumbered Fee Simple.

By a lease dated April 15, 1920, landlords demised premises to tenants for the term of three years. The lease contained a provision that the tenants should at any time during the term "have the option of purchasing all the estate interest and title which is at the date of these presents vested in the landlords in and to the freehold premises hereby demised and the fixtures and fittings . . . . at a price not exceeding 3000*l.*" On April 15, 1921, the tenants wrote exercising the option to purchase for 3000*l.* They subsequently found that the premises had not at the date of the lease been vested in the landlords for an unencumbered estate in fee simple, but had been mortgaged in 1910 to secure a loan of which 500*l.* was at the date of the lease and was still owing.

Held, that under the option the tenants were only entitled to acquire for 3000*l.* the actual interest in the premises that the landlords had at the time of the lease and, therefore, that the landlords were under no obligation to pay off the mortgage and convey the unencumbered fee simple in consideration of the purchase price of 3000*l.*

ACTION.

By deed dated April 15, 1920, the defendants demised to the plaintiffs a building used as a cinema theatre situate in

Commercial Road, Byker, Newcastle-upon-Tyne, known as Raby Hall, for the term of three years from November 24, 1919, at the yearly rent of 440*l.* 13*s.* 9*d.* By clause 20 of the lease it was provided that the tenants at any time during the term should "have the option of purchasing all the estate interest and title which is at the date of these presents vested in the landlords in and to the freehold premises hereby demised and the fixtures and fittings . . . . at a price not exceeding 3000*l.*"

Before the date of the lease the tenants had been in possession of the premises as tenants of the defendants under a previous lease dated April 2, 1917, which contained a similar option to purchase and before then the plaintiffs were in possession as assignees of a lease dated November 11, 1913, which contained a similar option to purchase.

By letter dated April 15, 1921, the plaintiffs' solicitors wrote to the defendants agent exercising the option to purchase for 3000*l.* and forwarding a deposit of 300*l.*

The defendants delivered their abstract of title to the freehold of the premises and from this the plaintiffs for the first time learned that the premises were subject to a mortgage to the Universal Building Society to secure 1001*l.* 1*s.* 4*d.*, repayable by instalments, created by deed dated February 22, 1910. The sum of 500*l.* remained due at the date of the lease of April 15, 1920, and was still due at the present time.

The plaintiffs then required the defendants to perfect their title by redeeming this mortgage but the defendants refused to do so, and contended that the contract created by the exercise of the option to purchase was for the purchase of the equity of redemption in the freehold premises.

Thereupon the plaintiffs brought this action claiming a declaration that it was the duty of the defendants to redeem the encumbrance on the freehold premises and specific performance.

A. Grant K.C. and *Jolly* for the plaintiffs. The words "estate interest and title" are the widest possible and

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suffice to pass all the interest that a man has, and he must convey the quality of estate possessed free from encumbrances: see the meanings attributed to "estate" "title" and "interest" in Norton on Deeds, p. 272, and the definition of "estate" in Stroud's Judicial Dictionary, 2nd ed., p. 642. The vendors are able to discharge the mortgage and are bound to do so or to get the mortgagees' concurrence: compare *Goold* v. *Birmingham, Dudley and District Banking Co.* (1) The meaning of estate and interest is discussed in *Delmer* v. *M'Cabe* (2) and *May* v. *Platt.* (3) The words are used as a general description of the quality of estate the vendors possess and that quality of estate must be conveyed free of incumbrances. The words relieve the vendors from remedying any defects in title but not from the obligation to complete the conveyance and for this purpose to obtain the concurrence of the mortgagees: *Bain* v. *Fothergill.* (4) The landlords are in effect trying to effect a sale for 3500*l.* instead of 3000*l.*

Galbraith K.C. and *G. D. Johnston* for the defendants. The precise point is discussed in Williams on Vendor and Purchaser, 2nd ed., p. 646, where it is laid down that, if a vendor has sold only such estate or interest as he has, he is entitled to require that he shall convey the same thing only.

[They were stopped.]

SARGANT J. This case raises a neat point as to the effect of an option in a lease dated April 15, 1920, by virtue of which the landlords covenanted that the tenants should have the option of purchasing "all the estate interest and title which is at the date of these presents vested in the landlords." [His Lordship stated the facts and, after saying that in his view no useful object would be served by looking at the language of the earlier lease, continued.] The question is, what was the property contracted to be sold upon the exercise of the option by the tenants? Was it the fee simple in the

(1) (1888) 4 Times L. R. 413; 58 L. T. 560.
(2) (1863) 14 Ir. C. L. Rep. 377.
(3) [1900] 1 Ch. 616, 619, 620.
(4) (1874) L. R. 7 H. L. 158, 209.

cinema theatre comprised in the lease or was it the estate and title of the landlords in the theatre? The matter was really decided by the answer to two questions I put in the course of the arguments. I asked, what estate, interest and title the mortgagees had in the property at the material date. The answer was the legal fee simple subject to the equity of redemption of the landlords. I then asked what was the estate interest and title vested in the landlords at the date of the lease, and the reply necessarily was that it was the equity of redemption in the property. These two answers seem to dispose of the matter. The option is not to purchase the premises comprised in the lease but "all the estate interest and title which is at the date of these presents vested in the landlords."

The tenants having given a notice to exercise the option in ignorance of the existence of the mortgage, the landlords might be in a position to force them to purchase the equity of redemption for 3000*l*. That however is not a matter I have to determine, for the landlords did not insist on this right and do not desire to force the lessees to complete on these terms. The only question I have to determine is whether the tenants are entitled to compel the landlords to sell them the unencumbered fee simple of the property for 3000*l*. Dealing with the matter from a common sense point of view and apart from authority, I come to the conclusion that the tenants are only entitled, on exercising the option, to what the lease itself says, the estate interest and title held by the landlords at the date of the lease.

A passage has been cited from Williams on Vendor and Purchaser, 2nd ed., p. 646, in which the exact point is discussed, and I am glad to express my assent to the view taken by the learned author that "if the vendor should have sold only such estate or interest as he has in some particular land, he is . . . . entitled to require that he shall convey the same thing only and in the same words." There are at least two cases within my own experience in which that view was taken. The first was one where the Marylebone Borough Council bought from the Metropolitan Electric Supply

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Company their undertaking within the Council's area. Certain parts of the properties of the Metropolitan Electric Supply Company that were being sold were subject to existing mortgages, and the Council set up a contention that they were entitled to have these mortgages discharged. To this the Metropolitan Electric Supply Company replied that they had only sold the undertaking which they had. That was taken by the Council as far as the Master in Chambers and was abandoned when about to be brought before the judge. Another case was when one insurance company agreed to sell to another insurance company their undertaking including the sum of 20,000*l.* deposited with the Paymaster-General under the Assurance Companies Act, 1909. That sum of 20,000*l.* was subject to claims by existing policy holders, and the purchasing company contended that they were entitled to a transfer of the sum of 20,000*l.* free of all claims. I held, and my view was subsequently confirmed by the Court of Appeal and the House of Lords (1), that the purchasing company was only entitled to the assets of the selling company in their existing condition, and must, therefore, take the sum of 20,000*l.* subject to the liabilities affecting it.

As the tenants are willing to complete even on the footing that they are only entitled to acquire the equity of redemption in the premises for 3000*l.*, I will declare that there is a valid contract for the sale of the equity of redemption and make a decree for specific performance.

Solicitors: *Milner & Bickford, for Thomas Gee & Co., Newcastle-upon-Tyne; Worthington Evans, Dauney & Co., for Mather & Dickinson, Newcastle-upon-Tyne.*

(1) *United London and Scottish Insurance Co.* v. *Omnium Insurance Corporation* (1915) 84 L. J. (Ch.) 777.

H. C. G.

Considered. *Re* REES' WILL TRUSTS. [1949] 1 All E.R. 609.

Observations of SARGANT, J., at p. 522, *applied*. *Re* REES' WILL TRUSTS. [1949] 2 All E.R. 1003.

Considered. *In re* REES' WILL TRUSTS. [1949] 1 Ch. 541

Considered. *In re* REES [1950] 1 Ch. 204

In re FOORD.

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1922

May 31.

[1922. F. 660.]

Will—Bequest on Trust to pay Annuity—"Absolutely"—Inexhaustive Trust —Intestacy—Beneficial Interest of first Taker.

A testator by his will made the following bequest: "All my effects including rubber and all other shares I leave absolutely to my sister M. J. on trust to pay my wife per annum (three hundred pounds)....." The bequest was more than sufficient to satisfy the annuity:—

Held, that the testator's sister was entitled to the beneficial interest of the balance and was not a trustee thereof for the next of kin.

ADJOURNED SUMMONS.

A testator Herbert Taynton Foord made his will dated May 26, 1919, in the following terms (omitting formal parts): "I will and bequeath to Selim Awad Khim $2000 as well as all my effects and furniture in China but all the valuable things are to be sent to my sister Miss Foord and $500 is to be allowed from my estate for the cost of packing and sending them home. Selim knows what things are to be sent home. All my effects including rubber and all other shares I leave absolutely to my sister Margaret Juliet on trust to pay to my wife per annum (three hundred pounds) with income tax, 100*l.* (one hundred pounds) to be free of income tax."

The testator was an engineer and had been for many years in China. He made his will on the day before his death by dictating it, as he lay ill, to his servant Selim. The bequest to the testator's sister Margaret Juliet Foord was more than sufficient to satisfy the wife's annuity. This summons was taken out by the sister, who was administratrix with the will annexed, asking (inter alia) whether upon the true construction of the will the gift to her was for her own benefit subject to and charged with payment of the annuity, or was given her, subject to the annuity, upon trust for the testator's next of kin.

A. Adams for the plaintiff. The general rule is that when property is given to A. upon trust for a particular purpose

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and there is more than sufficient property to satisfy that purpose A. holds the balance of the property on trust for the next of kin: *King* v. *Denison*. (1) But small indications in a testator's will are sufficient to take a case out of the rule, so that A. takes the balance beneficially: *Croome* v. *Croome*. (2) Compare *Williams* v. *Roberts*. (3) The use of the word "absolutely" in connection with the gift to the testator's sister is such an indication: see *Irvine* v. *Sullivan* (4), where the meaning of "absolutely" is discussed.

L. Cohen for the next of kin. It is no doubt true that the Court will lay hold of comparatively small indications to confer the beneficial interest on the first taker. The word "absolutely" is however a mere word of limitation and is not sufficient to confer a beneficial interest when it is followed by the words "on trust." The principle enunciated in *King* v. *Denison* (1) is directly applicable, and in so far as the purpose of the trust fails to be exhaustive, the property given to the testator's sister must be held by her as trustee for the next of kin.

SARGANT J. This is a difficult case and on the border line. The question is whether the gift to the testator's sister is a gift merely for the particular purpose of providing an annuity for the testator's wife, in which case there is a resulting trust of the balance of the estate for the testator's next of kin, or is not merely for that purpose, and as regards any balance belongs to the testator's sister beneficially. [His Lordship stated the facts and continued:] The principles applicable to the decision of this question are stated in what Bowen L.J. called the classic judgment of Lord Eldon in *King* v. *Denison* (5) in these terms: "The principles applicable to this case are very well settled. I adopt those expressed in *Hill* v. *Bishop of London* (6), as affording the grounds upon which Lord Hardwicke proceeded; but I will here point out the nicety of distinction, as it appears to me, upon which this

(1) (1813) 1 V. & B. 260, 272.
(2) (1888) 59 L. T. 582, 585; (1889) 61 L. T. 814.
(3) (1857) 4 Jur. (N. S.) 18.
(4) (1869) L. R. 8 Eq. 673, 680.
(5) 1 V. & B. 272.
(6) (1738) 1 Atk. 618.

Court has gone. If I give to A. and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of those two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose: the latter is a devise for a particular purpose; with no intention to give him any beneficial interest." And according as the one view or the other is adopted of the construction of each particular bequest, the legatee takes or does not take the surplus for his own benefit.

I have felt some doubt as to the effect of the direction to send "the valuable things" to the testator's sister; and the question arises on the construction of the will whether that is a mere direction that they are to be sent to her by the attendant Selim, leaving the beneficial ownership to be determined by the subsequent clause, or is in itself a gift to the sister Miss Foord. At first I thought it was more than a mere direction and that it was intended as a gift, and the only gift, of these valuable things. On the whole I have come to the conclusion that this is not so and that the subsequent gift of "all my effects including rubber and all other shares" operates upon the valuable part of the Chinese effects which were to be sent to the testator's sister.

That being so I have to deal with the main question of the effect of the gift to the sister on trust to pay the wife's annuity. While a gift to A. upon trust for the provision of a certain interest for B., without more, must, I think, be construed as a gift to A. merely to fulfil the beneficial interest of B. and must not be construed as a gift to A. of all that is not required to satisfy B.'s interest, yet looking at the case of *Croome* v. *Croome* (1), which I employ for the purpose of seeing the general spirit in which the Court deals with cases of this character, I find that the Court is prepared to hold that there is a beneficial gift to the first taker on slight expressions and

(1) 59 L. T. 582.

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indications of intention. The indications there were so slight that the judges of the Court of Appeal confessed that it was difficult to state in words reasons for the impression produced on their minds by the language of the testator's will.

Here there are several indications which tend to show that the gift to Margaret Juliet the testator's sister was not a mere gift upon trust. First, there is the use of the word "absolutely." No doubt it might, especially if used by some one acquainted with legal language, be construed as describing the extent of the interest in the property given—namely, the fee simple in freehold property and the absolute interest in personal property. But I think in this extremely untechnical will the testator must have used it to mean "out and out," and that it therefore carried not merely the full legal interest but the beneficial interest also. Another indication is that the beneficiary is described by the testator as "my sister," so that the testator was recognizing the relationship existing between them and was probably founding his generosity on the existence of that relationship. There was no particular reason to describe her as his sister if he was only going to make her a bare trustee. Moreover he refers to her as "my sister Margaret Juliet" and not as Miss Foord, as he did in the earlier part of the will. Thirdly some indication is to be drawn from the words by which he commences the gift "All my effects including rubber and all other shares." That gift includes the testator's effects, so that he was giving property some of which would and some of which would not produce income. That is some indication that the trust only applies to a portion of the property given out and out to the testator's sister. No doubt the effects could be sold in case of need and the proceeds invested and the income so increased. But I do not think that is the sort of thing a testator making his will at the last moment in a foreign land would have in contemplation.

I feel here the difficulty expressed by Bowen and Fry L.JJ. in *Croome* v. *Croome*. (1) As Fry L.J. said: "It is difficult, no doubt, to express in words the exact impression

(1) 59 L. T. 582, 585, 586.

which the language of a testator often produces on the mind; but the result of the language of the testator in this case is to convince me that he had given the real estate to his brother for a purpose which he does not contemplate as exhausting the whole." Here also I find it difficult to express in words the general effect produced on my mind by the language of the testator; but I have become convinced as the argument went on, contrary to the view I took at first, that the beneficial interest was given to the sister, and I will so declare.

Solicitors: *Stephenson, Harwood & Tatham for all parties.*

H. C. G.

In re MEEKING.

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[1922. M. 570.]

Will—Settled Land—Rentcharge payable so long as Tenant in Tail under Will—Disentailing Assurance and Resettlement to Uses of Will—Rentcharge not determined.

By his will dated June 16, 1910, a testator settled the B. estates to the same uses as were limited by a settlement of July 21, 1893, of other estates under which they stood limited at the testator's death to the use of his daughter V. in tail male with remainder to her sister F. in tail male with divers remainders over. He also devised other property to the use that his trustees should receive a rentcharge "during such period or periods continuous or discontinuous" as either of them, the said V. and F., "shall be tenant for life in possession or tenant in tail male or in tail in possession under this my will" of the B. estates and pay the same to such one of them, the said V. and F., "as shall for the time being be tenant for life in possession or tenant in tail male or in tail in possession under this my will" of the B. estates.

By a disentailing assurance dated July 22, 1918, V. disentailed the B. estates and resettled them to such uses as she should appoint or in default of and until and subject to any such appointment to the uses which immediately before the execution of the disentailing assurance were subsisting or capable of taking effect:—

Held, that V. did not as a result of the disentailing assurance cease to be tenant in tail male in possession of the B. estates under the testator's will, and, therefore, that the rentcharge given to her by the

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same will had not been determined by the execution of the disentailing assurance.

Harrison v. *Round* (1852) 2 D. M. & G. 190 and *In re Constable's Settled Estates* [1919] 1 Ch. 178 discussed.

ADJOURNED SUMMONS.

The following statement of the facts is taken from the judgment of Sargant J. :—

At the dates both of the will and of the death of the testator, Charles Meeking, certain estates in the county of Bucks (known and hereinafter referred to as the Richings Park Estate) stood limited, under a settlement of July 21, 1893 (subject to certain charges or powers of charging to which it is unnecessary to refer here), to the uses following—namely, to the use of the testator for life with remainder to the use of the plaintiff, the eldest daughter of the testator's deceased son, Bertram Charles Christopher Spencer Meeking, in tail male, with remainder to the use of the plaintiff's sister, Daisy Finula Meeking (now the wife of Lord Arthur Herbert Tennyson Somers) in tail male, with remainder to the use of Adelaide Maud Meeking, a daughter of the said Charles Meeking by his first marriage, for her life with remainder to the use of the first and other sons of the said Adelaide Maud Meeking in tail male, with remainder to the defendant Sybille Marie Annie Meeking, a daughter of the said Charles Meeking by his second marriage in tail male with remainder to the use of the same daughters of Charles Meeking successively in tail general with divers remainders over. The limitation to the first and other sons of the said Adelaide Maud Meeking was at the dates aforesaid a limitation which could never in fact become effective.

The testator's will was made on June 16, 1910, and he died on March 1, 1912, and was survived by his second wife, by his two granddaughters, the plaintiff, and Lady Arthur Tennyson Somers, and also by his two daughters, Adelaide Maud Meeking and her half-sister, the defendant Sybille Marie Annie Meeking, who is an infant about thirteen years of age. The testator's will was long and elaborate and was obviously the work of an experienced draftsman. It will be necessary

to refer only to clauses 25, 32, 33, 34 (*a*), 35 and 40, thereof as set out in the affidavit of James Cox Macro Allen Wilson filed on March 13, 1922. They are as follows :—

"By clause 25 the testator devised 'his freehold hereditaments not thereby otherwise disposed of' (which hereditaments were thereinafter referred to as his principal settled estates) to the use of his trustees for a term of 1000 years upon the trusts thereinafter declared and subject thereto the clause continued 'to the use that my trustees and their heirs shall out of the rents and profits accruing in any year receive during such period or periods continuous or discontinuous as either of them the said Viola Meeking' (meaning the plaintiff herein) 'and Finula Meeking shall be tenant for life in possession or tenant in tail male or in tail in possession under this my will and entitled to receive and retain for her own use the rents and profits of the estates hereinafter referred to as my Buckinghamshire Estate a rentcharge (hereinafter called the Richings Park Rentcharge) of the amount hereinafter mentioned,' and subject thereto (in the events which have happened) to the use of his daughter the defendant Sybille Marie Annie Meeking . . . . during her life with remainder to her children in strict settlement with an ultimate limitation in default of such children to the uses of the Richings Park Settlement."

" By clause 32 of the said will the testator declared that his principal settled estates were devised to his trustees for the said term of 1000 years upon the trust therein mentioned for securing payment of annuities bequeathed by the said will."

"Clause 33 of the said will dealt with the Richings Park rentcharge and is in the following terms: 'I declare that the following provisions with respect to the Richings Park rentcharge shall have effect that is to say' ": and then the clause provided in sub-clause (*a*) for the exact amount of the Richings Park rentcharge. In some cases it would be less than 2000*l*. Then it went on in sub-clause (*b*): " The Richings Park rentcharge shall be held by my trustees upon

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trust to pay the same to such one of them the said Viola Meeking and Finula Meeking as shall for the time being be tenant for life in possession or tenant in tail male or in tail in possession under this my will of my estates hereinafter referred to as my Buckinghamshire Estates."

"By clause 34 (*a*) of his said will the testator devised his freehold hereditaments in the parishes of Iver Langley Colnbrook or adjoining parishes (which hereditaments were thereinafter and are hereinafter referred to as his Buckinghamshire Estates) to the use of his trustees for a term of 999 years upon the trusts therein mentioned and subject thereto to the uses upon the trusts and with and subject to the powers and provisions declared and contained by and in the Richings Park Settlement of the hereditaments thereby settled or such of the same uses trusts powers and provisions as should at the time of his death be subsisting or capable of taking effect."

"By clause 35 of his said will the testator declared trusts of the said term of 999 years in his Buckinghamshire estates such trusts being in effect to raise out of the rents and profits of such estates or otherwise as therein mentioned any deficiency which there should be in any years in the annuities given by the said will after provisions should have been made for such annuities out of the income of his residuary personal estate and his principal settled estates And the said will contained power for the trustees to release any of the said hereditaments from the said term of 999 years if satisfied that the said annuities would be otherwise sufficiently secured."

"By clause 40 of his said will the testator bequeathed his residuary personal estate to his trustees upon trust for sale and after payment of his funeral and testamentary expenses, debts and legacies to invest the proceeds of sale in the purchase of freehold hereditaments to be settled to the uses to which the purchased hereditaments would be subject if the same had been purchased with capital moneys arising from any part of his principal settled estates."

By an indenture dated July 22, 1918, and duly enrolled as a disentailing assurance the plaintiff conveyed and disposed

of to one Herbert Johnson all the lands and other hereditaments forming the Richings Park Estates or of or to which under the devise contained in clause 34 (*a*) of the testator's will the plaintiff was then seised or entitled for an estate in tail male or in tail or quasi in tail male in possession, whether legal or equitable, to hold unto the said Herbert Johnson in fee simple freed and discharged from the estate in tail male of the plaintiff under the said settlement of July 21, 1893, and all other estates in tail male or quasi in tail male or in tail (if any) of the plaintiff, to such uses as the plaintiff should by deed revocable or irrevocable or by will or codicil appoint, and in default of and until and subject to any such appointment to the uses upon the trusts and with and subject to the powers and provisions which immediately before the execution of the said disentailing assurance were subsisting or capable of taking effect with reference to the premises thereinbefore conveyed respectively and so as to restore, confirm and continue the same trusts, powers and provisions respectively.

By a deed poll dated July 23, 1918, and under her hand and seal the plaintiff in exercise of the power given to her by the said disentailing assurance appointed that the Richings Park Estate and the hereditaments devised by the will of the testator to the like uses should, after the determination of the successive estates in tail male limited by the said settlement of July 21, 1893, to the plaintiff and her said sister, go remain and be to the use of the plaintiff in fee simple.

The plaintiff being desirous of selling the Richings Park Estate and the testator's Buckinghamshire estates devised to go therewith took out the present originating summons by which as originally framed the only questions specifically asked were these: "Whether upon the true construction of the said will dated June 16, 1910, of the above named Charles Meeking the Richings Park rentcharge in such will referred to will continue to be payable to the plaintiff (*a*) If she sells the Buckinghamshire Estates of the said testator referred to in his said will as tenant for life or a person having the powers of a tenant for life under the Settled Land Acts, 1882 to 1890, and remains tenant for life in possession or tenant

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in tail male or in tail in possession under the said testator's will of the proceeds of sale of the said Buckinghamshire Estates; (*b*) If she sells the said Buckinghamshire Estates under a general power of appointment vested in her and receives the proceeds of sale for her own use."

At the hearing an amendment of the summons was proposed, which consisted in adding the following further question: "Whether on the true construction of the will dated June 16, 1910, of the above named Charles Meeking the Richings Park rentcharge in such will referred to was or was not determined by the execution by the plaintiff of the disentailing assurance dated July 22, 1918, ... and/or a deed poll of appointment under the hand of the plaintiff whereby the plaintiff exercised the general power of appointment limited to her by the said disentailing assurance and if the said rentcharge was so determined as from what date the determination took effect."

J. W. F. Beaumont for the plaintiff. A sale of the Buckinghamshire estates under the Settled Land Acts will not determine the Richings Park rentcharge in view of s. 51 of the Settled Land Act, 1882; but it is clear that a sale by the plaintiff under the general power of appointment for her own use would determine the rentcharge, and it is impossible to argue the contrary.

On the further question added to the summons two matters arise for consideration. The first is whether on the construction of the particular will the continuation of the plaintiff's rentcharge is dependent on her holding directly under the will. If not, it is immaterial to consider the effect of the disentailing assurance. The trust of this rentcharge is to pay the same to such one of the plaintiff and her sister "as shall for the time being be tenant for life in possession or tenant in tail male or in tail in possession under this my will" of the Buckinghamshire estates. The words "under this my will" must mean "under or having regard to the provisions of this my will," because the plaintiff could never be a tenant for life under the limitations of the will, but only as the result of a disentailing assurance.

If, however, this construction of the will is not adopted, the further question arises whether the plaintiff ceased to be tenant in tail male "under this my will" by reason of the disentailing assurance, seeing that it restored the old limitations subject only to a general power of appointment. If not, the exercise of the power by the deed poll of July 23, 1918, is immaterial, as it left standing the estates in tail male limited to the plaintiff and her sister. There is no doubt that until the decision in *In re Constable's Settled Estates* (1) the restoration of an old limitation under a disentailing assurance was treated as effective; and *In re Constable's Settled Estates* (1) is distinguishable on the ground that there had there been an appointment by way of resettlement as well as a disentailing assurance. The conveyance in the disentailing assurance was to such uses as the plaintiff should appoint. If it had stopped there, there would have been a resulting trust and the property would have gone upon the old uses, so that the plaintiff would then have been in of her "ancient use in point of reverter": Co. upon Litt., vol. i., p. 23*a*; *Beckwith's Case.* (2) The only difference here is that, instead of leaving the old uses to be re-established by way of reverter, the disentailing assurance directed that the property should be held by the grantee to the uses upon the trusts and with and subject to the powers and provisions which immediately before the execution of the disentailing assurance were subsisting or capable of taking effect and so as to restore confirm and continue the same. That can have no different effect: *Abbot* v. *Burton* (3); *Harrison* v. *Round.* (4) It is true that *Harrison* v. *Round* (4) was commented on in *In re Constable's Settled Estates* (1) and explained as resting on the old rule that "if an estate be granted upon condition, and the grantor re-enter for condition broken, he is in and seised of his former estate." It is submitted that here also the plaintiff was as a result of the disentailing assurance in of her own estate and that, as

(1) [1919] 1 Ch. 178, 194, 195, 196.
(2) (1589) 2 Rep. 56*b*, 57*a*.
(3) (1709) 2 Salk. 590.
(4) 2 D. M. & G. 190.

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already suggested, *In re Constable's Settled Estates* (1) is distinguishable. A disentailing assurance does not take away the estate of the tenant in tail: *Lord Lilford* v. *Attorney-General* (2); *In re Gaskell and Walter's Contract.* (3)

Ashworth James for the defendant Sybille M. A. Meeking. If the plaintiff's contention as to the construction of the testator's will is correct, the question as to the effect of *In re Constable's Settled Estates* (4) does not arise. It is quite true that the plaintiff could not be tenant for life in possession directly under the will, but the real intention of the provision determining the Richings Park rentcharge is that the plaintiff shall no longer receive it if she breaks the settlement. In fact the settlement has been broken by the combined effect of the disentailing assurance and the deed poll. It is true that the plaintiff could have disentailed the subsequent estate in tail general limited to her without losing the rentcharge.

[SARGANT J. Really then the only objection is to the disentailing assurance, which inserted a power of appointment in front of the plaintiff's estate tail.]

The disentailing assurance swept away all the limitations of the will. It may be that mere silence after creating the power of appointment would have restored the ancient uses by way of resulting trust; but here the uses have been expressed in the disentailing assurance, and although in *Abbot* v. *Burton* (5) this was treated as making no difference, that case was decided before the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), was passed. Sect. 3 of that Act provides that "when any land shall have been limited, by any assurance executed after" December 31, 1833, "to the person . . . . who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof." This renders the earlier decisions referred to obsolete, and *Harrison* v. *Round* (6)

(1) [1919] 1 Ch. 178, 194, 195, 196.
(2) (1867) L. R. 2 H. L. 63.
(3) [1906] 2 Ch. 1.
(4) [1919] 1 Ch. 178.
(5) 2 Salk. 590.
(6) 2 D. M. & G. 190.

is explained in *In re Constable's Settled Estates.* (1) The powers of the person disentailing are left undisturbed, because a man can convey his estates away without extinguishing the powers given him: *Alexander* v. *Mills.* (2) *In re Constable's Settled Estates* (1) is directly in point here and the plaintiff has ceased to be tenant in tail male or in tail under the testator's will and the rentcharge is therefore determined.

Dighton Pollock for the trustees.

J. W. F. Beaumont in reply. The Inheritance Act, 1833, only applies for the purpose of tracing descent for the purpose of inheritance and has no application here. It does not affect the general law at all. The earlier cases are therefore still authoritative.

Cur. adv. vult.

June 2. SARGANT J. delivered a written judgment in which, after stating the facts, he read the questions contained in the adjourned summons, other than the question added by way of amendment, and continued: Neither of these questions presents any real difficulty. It is clear, and indeed was admitted by Mr. Ashworth James as representing the infant defendant, that a sale of the devised Buckinghamshire estates by the plaintiff as tenant for life under the Settled Land Acts would not affect her right to receive the Richings Park rentcharge out of the proceeds of sale. The provisions of s. 51 of the Settled Land Act, 1882, directly apply. On the other hand it is equally clear, and was admitted by Mr. Beaumont for the plaintiff, that in case of a sale by her under her general power and apart from the Settled Land Acts, there would be a termination of the period for which the rentcharge was limited to her, and there would be no statutory or other provision by virtue whereof the rentcharge would be saved from determining.

The real difficulty with which I have been faced, and which has rendered it necessary for me to put my judgment into writing, arises from an amendment of the originating

(1) [1919] 1 Ch. 178. (2) (1870) L. R. 6 Ch. 124.

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summons which was proposed by Mr. Ashworth James, and has consisted in adding to it a further question—namely, whether upon the true construction of the will of the testator the Richings Park rentcharge was or was not determined by the execution by the plaintiff of the disentailing assurance of July 22, 1918, and the deed poll of the following day or of either of these instruments, and if it was so determined, then from what date the determination took effect. The answer to this question obviously depends upon whether the execution of these instruments, or of either of them, caused the plaintiff to cease to be within the meaning of the testator's will tenant for life in possession or tenant in tail male or in tail in possession of the testator's Buckinghamshire estates under his will.

For the present purpose the deed poll of July 23, 1918, may, in my judgment, be disregarded altogether. It operated only upon estates subsequent to both the estate in tail male in possession of the plaintiff under the will and the immediate reversionary estate in tail male of her younger sister. It did no doubt in fact destroy all later reversionary estates and interests including that of the infant defendant, and might perhaps have been in conflict with the benevolent intentions of the testator towards her. But there is nothing in the will entitling me to extend the language of the testator so as to penalise the plaintiff in respect of every deprivation of the infant defendant. I must follow the language of the will. That language entitles the plaintiff to the rentcharge so long as her defined possession under the will exists; and her possession is in no way interfered with by the deed poll.

I proceed therefore to consider the matter as if the only document executed by the plaintiff had been the disentailing assurance of July 22, 1918. Was the effect of this document that the plaintiff ceased to be tenant for life in possession or tenant in tail male or in tail in possession under the testator's will? Had this question been asked at the date when the disentailing assurance, obviously the handiwork of an expert conveyancer, was executed, there would, I think, have been no difficulty in answering it. The decision of

Lord St. Leonards in *Harrison* v. *Round* (1) is a direct authority that an owner who had disentailed or had purported to reserve a general power, and then to relimit the old uses, still held an estate under the prior instruments and not a new estate under the disentail. Indeed there the main difficulty arose not from the mere disentail and relimitation but from the fact, which is not present here, that under the general power there had subsequently been effected a heavy mortgage which very prejudicially affected the value of the settled estate. The possibility of relimiting the old uses so as to restore and confirm them and leave the tenant in tail "in" as of his former estate was not seriously questioned; and to question it would have been to cast doubt upon the ordinary form both of deeds to lead the uses of recoveries prior to the Act for the abolition of fines and recoveries, and of the corresponding deeds which were executed under the provisions of that Act. The deed stated in the report of *Harrison* v. *Round* (1) may be taken as an ordinary specimen of deeds prior to the Act. And the deed of disentail in this case, so far as it purports to restore and confirm the old uses, is a fair specimen of deeds subsequent to the Act, as will appear from the precedents referred to in a later part of this judgment.

The ordinarily accepted view that previously existing estates can be and are restored on a resettlement, and that, in the case of life estates, it is through a restoration of these estates that the powers annexed to them are preserved, is clearly stated in Davidson's Precedents, 3rd ed., vol. iii., Part I., p. 596, where it is added that "it appears that this doctrine does not depend upon any technical considerations, but upon the expressed intention, coupled with the circumstance that no incumbrance is created inconsistent with the exercise of the old powers." And in Sugden on Powers, 8th ed., p. 71, Lord St. Leonards sums the matter up thus: "The old use is restored, the intention is expressed, and no incumbrance is created to prevent the exercise of the old powers." The decisions of Pearson J. in *In re Wright's Trustees and Marshall* (2), and of Farwell J. in *In re Cornwallis-*

(1) 2 D. M. & G. 190. (2) (1884) 28 Ch. D. 93.

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West and Munro's Contract (1), as explained in *In re Lord Wimborne and Browne's Contract* (2), are exactly in accordance with Lord St. Leonards' views in the two passages just cited. And the judgment of Lindley M.R. and Chitty L.J. in *In re Mundy and Roper's Contract* (3) refers with approval to Davidson's Precedents, 3rd ed., vol. iii., Part I., pp. 594 et seq., and clearly indicates the opinion of the two Lords Justices, that the ordinary method of restoring life estates and thereby preserving the powers annexed to them is a well-recognized and efficacious one. The question of the possibility of restoring estates has of course usually arisen with regard to life estates rather than estates of inheritance, because of the special importance of the former class of estates in relation to the exercise of powers.

The doubt that has arisen here, and it is a grave doubt, is caused by the reasoning in a decision of the Court of Appeal: *In re Constable's Settled Estates* (4), which was given about a year after the execution of the disentailing assurance in this case. There a tenant for life had joined in, and conveyed his life estate by a disentailing deed which had reserved a joint power to him, and the former tenant in tail, and had, in default of appointment, purported to relimit the property to the previously subsisting uses and trusts; and subsequently, under a resettlement executed under the joint power, the property had been resettled, subject to existing mortgages and a jointure and portions, to such uses as the tenant for life, and tenant in tail, should jointly appoint, and in default of appointment to the use of the tenant for life for his life "in restoration and by way of confirmation of the life estate or estates limited to him" by the previous settlement, and of all powers of jointuring and charging portions with remainders over. The question was whether the tenant for life was in possession as tenant for life under the previous settlement, as the documents purported to make him, or was in possession as tenant for life under the resettlement, notwithstanding the terms thereof. And the Court of Appeal

(1) [1903] 2 Ch. 150.
(2) [1904] 1 Ch. 537.
(3) [1899] 1 Ch. 275, 294.
(4) [1919] 1 Ch. 178.

decided that the tenant for life was in possession under the resettlement, and that his life estate under the prior settlement was destroyed, though the powers under that prior settlement might have been preserved.

The case itself is not nearly as direct an authority against the plaintiff here as the case of *Harrison* v. *Round* (1) is in her favour. For it deals with a life estate, and not an estate in tail; and, further, in *In re Constable's Settled Estates* (2) there had been not only a disentailing deed with a creation of a power, as in the present case, but an actual exercise of the power by way of a complete resettlement. But there are passages in the judgment in *In re Constable's Settled Estates* (2) with regard to the applicability of *Harrison* v. *Round* (1) to disentailing assurances which operate under the statute for the abolition of fines and recoveries, such as *In re Wright's Trustees and Marshall* (3), and the present case, which require most careful consideration.

The main reason why the decision in *Harrison* v. *Round* (1) is stated not to be applicable to ordinary cases under the statute is that in *Harrison* v. *Round* (1) the conveyance to the tenant to the præcipe of a life estate during the joint lives of the father and son had contained the well-known 100,000*l.* clause, which avoided the estate so conveyed on the nonpayment of the sum in question, and so ultimately replaced the father in possession as of his old estate by virtue of a condition broken. But in fact this clause was only introduced for the special reason that the conveyance of the life estate for the purpose of a recovery might, apart from this clause, have a "ransacking" effect, and result in the forfeiture of the life estate, and the simultaneous destruction of the powers annexed to that estate. And when once this danger was gone by reason of the abolition of recoveries, and the substitution for them of disentailing deeds operating as innocent conveyances under the statute of uses by way of transmutation of possession, the whole raison d'être of the 100,000*l.* clause was gone, and it was forthwith abandoned:

(1) 2 D. M. & G. 190. (2) [1919] 1 Ch. 178.
(3) 28 Ch. D. 93.

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see Davidson's Precedents, 3rd ed., vol. iii., Part I., p. 595; Vaizey on Settlements, vol. ii., pp. 1506, 1507. It would seem, therefore, though I necessarily propound this with great hesitation, and much respect to the judgment of the Court of Appeal, that even as regards the life estate which was in question in *In re Wright's Trustees and Marshall* (1) Pearson J. was justified in treating *Harrison* v. *Round* (2) as an authority which was applicable generally, and not merely with regard to cases where there had been a 100,000*l.* clause. And as regards an estate tail in remainder, such as that in the present case, the matter is even clearer. The 100,000*l.* clause never applied or had reference to any such estate; and therefore the presence of this clause in the deed constituting the tenant to the præcipe in *Harrison* v. *Round* (2) is obviously quite immaterial for the purpose of distinguishing that case from the present.

A more material distinction between *Harrison* v. *Round* (2) and the present case may be thought to lie in the provisions of s. 3 of the Act to amend the law of inheritance (3 & 4 Will. 4, c. 106), which was not in force at the date of the recovery in *Harrison* v. *Round.* (2) This section, and a suggestion with reference to it in Davidson's Precedents, 3rd ed., vol. iii., Part I., p. 596, are referred to in the judgment of the Court of Appeal in *In re Constable's Settled Estates* (3); and though in that judgment the section is, apparently, by a slip, held to affect the conveyance of a life estate (the Act being expressly limited to estates of inheritance—see, for instance, the definition therein of the word "land"), yet the passage in question must, I think, be taken as some indication of the view of the Court of Appeal, that, though the intention of the section may have been merely to alter the tracing of descent, this purpose was effected by means of a general alteration of the nature of the estate belonging to a grantor to whom there came, under the terms of his grant, an estate similar to that which he had previously owned. And, if so, in a case like this where, under the indenture of July 22,

(1) 28 Ch. D. 93. (2) 2 D. M. & G. 190.
(3) [1919] 1 Ch. 178, 194.

1918, the plaintiff took subject to a general power an estate or estates of inheritance precisely corresponding to her previous estates, it would appear that, from the strictest and most technical point of view, the estate would be a new estate arising under the indenture of disentail, and not the old estate under the previous instrument; and this although the plain intention of the grantor, as expressed in the instrument of disentail, was not to create a new estate, but to restore and confirm a previously existing estate.

Whether this is the somewhat unexpected result of the Act to amend the law of inheritance is a question that can hardly be considered settled by the passage in the judgment of the Court of Appeal to which I have just referred, and that may have ultimately to be determined in some future case where it is of vital importance. It certainly seems counter to the general practice of conveyancers, as evidenced by a large number of precedents to which I have referred, including those in Davidson's Precedents, 3rd ed., vol. iii., Part II., pp. 1039 and 1293; Hayes' Introduction to Conveyancing, 5th ed., vol. ii., p. 168; and Key and Elphinstone's Precedents in Conveyancing, 9th ed., vol. ii., p. 720. (1) In all the above precedents, as in the disentailing deed now in question, the previous uses and trusts are stated to be restored and confirmed, a result which, according to this part of the reasoning in *In re Constable's Settled Estates* (2), would be impossible in view of the alteration in the law effected by the Act to amend the law of inheritance. And having in view the great importance which has always been attached by the Court to effectuating the general intention of the parties to transactions of this kind, it may well be doubted whether the Court would hold that a section of an Act passed for a totally different purpose necessarily frustrated the carrying out of any such intention in the future. It is not immaterial also to observe that after the passing of the Act for the abolition of fines and recoveries, it became impossible for any tenant in tail to disentail otherwise than by a deed enrolled under the Act. And it would be a curious result of that Act and

(1) 10th ed., vol. i., p. 797. (2) [1919] 1 Ch. 178.

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the Act to amend the law of inheritance if, by the combined operation of the two Acts, a tenant in tail could not merely enlarge his existing estate into a fee simple, but must, in the process of disentailing, necessarily acquire a completely new estate, not only for the purpose of tracing descent, but for all other purposes.

Such a result would appear to be in conflict with the opinion of the very learned authors of Hayes' Introduction to Conveyancing, 5th ed., vol. i., p. 156. For in commenting there on the words in s. 40 of the Fines and Recoveries Act, "as if his estate were an estate at law in fee simple absolute," he observes that they must be interpreted "as if an estate in fee simple absolute occupied the very place of the estate tail"; and see also the indication of his view at p. 317 of the same volume that s. 3 may only operate for the purpose of tracing descent. It seems also to be somewhat inconsistent with the case of *Lord Lilford* v. *Attorney-General.* (1) There the disentail in question had been effected in the year 1860 by a disentailing assurance under the statute, and the House of Lords held that the fee simple acquired by the grantor was an estate in continuation of his former estate in tail, and not, as would, apparently, have been the case had the Act to amend the law of inheritance applied, a new estate under the disentailing deed. In the words of the Lord Chancellor (1): "The disentailing deed did not operate to destroy the interest of which he was the successor, but enabled him, by the exercise of the power which that interest gave him, to render it perpetual."

It is true that the case last mentioned was one on a revenue statute, and not, therefore, one in which the language was to be scrutinised with extreme technicality. But this remark seems to me to apply with at least equal force to the language of the will now in question. In prescribing that either of his daughters shall receive the Richings Park rentcharge while in possession "under this my will," the testator can hardly have intended to exclude a possession which remained, substantially, under

(1) L. R. 2 H. L. 63, 70.

the will, and the only difference in which was that arising from the estate of one of the daughters having momentarily passed to a grantee to uses, and immediately returned to her entirely unaltered, except for the creation of a power, and from the possibility that some prior estate might thereafter be limited under that power. Such a construction would, in my judgment, be too strict, and attribute too much effect to the result of s. 3 of the Act to amend the law of inheritance, even apart from the expressions to which I am about to refer. But my view against such a construction is much strengthened by the fact that in this part of the will the testator uses the phrase "during such periods, continuous or discontinuous," and refers to, and, indeed, mentions first, the alternative of either of the daughters being tenant for life in possession. For under the limitations of the will, and having regard to the uses to which the Richings Park estates stood limited, the only estate that either of the daughters, Viola or Finula would take in the Buckinghamshire estates under the will was a continuous estate in tail male, or in tail; and therefore in prescribing that the Richings Park rentcharge should endure while either of them was in possession, not merely as tenant in tail male, or in tail, but as tenant for life, and that the enjoyment might be for discontinuous periods, the testator must have been contemplating, and providing for, some period or periods of possession which arose by virtue not merely of the will itself, but also of some other subsequent instrument or instruments.

In my judgment, therefore, the question added to the summons by way of amendment must be answered by declaring that the Richings Park rentcharge was not determined either by the disentailing assurance, or by the deed poll mentioned in the question.

Solicitors: *Pontifex, Pitt & Co.*

H. C. G.

Distinguished. WESTON v. HENSHAW [1950] 1 Ch. 510

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March 14, 15, 16; *April* 12.

In re DE LEEUW.

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[1921. D. 1610.]

Mortgage—Personation by Executor—Forged Signature—Void Deed—Judgment in undefended Foreclosure Action against Executors—Executors representing the Estate—Rules of Supreme Court, Order XVI., *r.* 8—*Extent of Rule—Estoppel—Beneficiaries not bound in Case of Fraud—Purchaser for Value without Notice—Land Registry Indorsements—Notice—"Transfer for valuable consideration"—Foreclosure Order Absolute—Land Transfer Act,* 1875 (38 *&* 39 *Vict. c.* 87), *s.* 35—*Land Transfer Rules* 140 *and* 142—*Rectification of Register.*

In 1918 C., an executor and trustee, who bore the same names as his father, the testator, who had died in 1908, mortgaged to the defendant company, for his own purposes and without the knowledge of his mother who was his co-executor and co-trustee, leasehold houses which had been assigned in 1907 to the testator by whom the leases, or an attested copy, and the assignments had been registered at the Land Registry, and they bore a red ink indorsement to that effect. The executors had also been registered as proprietors of the houses in question and were described in the Register as "executors" of the testator. When obtaining the loan C. produced the documents which his father had registered but did not produce the probate of his father's will or the land certificates, and fraudulently represented himself to be the person to whom the leases had been assigned. The company advanced the money to C. without inspecting the Register, believing that he was the absolute owner of the leaseholds, and in executing the mortgages C. in fact personated his father.

Upon the instalments falling into arrear the company made inquiries of C. and obtained the land certificates from him, and discovered that he was one of two executors and had personated his father, but he assured the company that the money was borrowed for executorship purposes. The company then commenced foreclosure proceedings against the executors, C. and his mother, for whom C., without her authority, entered an appearance. The statement of claim alleged that the mortgage money had been raised by the executors for executorship purposes and had been duly executed by C. as executor and with the knowledge and consent of his mother, and alternatively that the two executors had been guilty of fraud. No defence was delivered and the subsequent proceedings were served at an address for service given by C., which was not the address of his mother's residence, and she did not have any actual cognizance of them. The company obtained judgment and, after the order for foreclosure absolute was made, the company was entered on the Land Register as proprietor of the leaseholds in question, and put the property up for sale.

The children of the testator (other than C.), who, subject to their mother's life interest, were (with C.) the ultimate beneficiaries under the testator's will, then commenced this action for a declaration that the mortgages and foreclosure order were invalid as against them. New trustees of the will had been appointed before the trial of the action and were co-plaintiffs.

Held, (1.) that C.'s signature to the mortgages was a forgery and that as against the plaintiff beneficiaries the deeds were void;

In re Cooper (1882) 20 Ch. D. 611 followed.

(2.) that, in the circumstances, the plaintiff beneficiaries were not in fact represented by the executors in the foreclosure action and were not bound by the judgment therein or, by virtue of Order XVI., r. 8, estopped from establishing their rights;

Cox v. *Dublin City Distillery Co.* [1917] 1 I. R. 203 distinguished.

Order XVI., r. 8, applies where the executor or trustee in fact represents the beneficiaries whose interests it is his duty to protect, but does not apply where the beneficiaries have solid grounds for impeaching a transaction between a fraudulent executor or trustee and the plaintiff;

(3.) that the mortgages being void, except by estoppel as against the beneficial interest of C., no estate passed, and the question of purchaser for value did not arise;

If it had been necessary to determine that question, the Land Registry indorsements on the documents of title were actual notice of the registration and constructive notice of the facts which the company would have ascertained by inspecting the Register or by requiring the land certificates to be handed over;

(4.) that an Order for foreclosure absolute was not a "transfer for valuable consideration" within the meaning of s. 35 of the Land Transfer Act, 1875, and the Land Transfer Rules 140 and 142, so as to confer on the company a title which the plaintiffs could not impeach.

Huntington v. *Inland Revenue Commissioners* [1896] 1 Q. B. 422 and *In re Lovell & Collard's Contract* [1907] 1 Ch. 249 distinguished; and

(5.) that the Court had power under ss. 95 and 96 of the Land Transfer Act, 1875, to direct the Register to be rectified by inserting the names of the plaintiff trustees as proprietors of the leaseholds in question.

THIS was an action, tried with witnesses, in which beneficiaries under the will of Charles de Leeuw, the above-named testator, sought to establish that two mortgages created in favour of the defendant company and a foreclosure decree obtained by that company were invalid as against them. The material facts and evidence were as follows:—

The testator was the assignee of the leases of two houses known as 11 Kenmare Road and 19 Brampton Road, Hackney, in the county of London. In 1907 he was registered under the Land Transfer Acts as proprietor with a possessory title of both houses and obtained the usual certificates from

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the Land Registry. The lease and the assignment of 11 Kenmare Road were indorsed in red ink by the Registrar with the words "Land Registry London No. 122,399 Registered 22 April 1907." In the lease of No. 19 Brampton Road were included Nos. 21 and 23 Brampton Road. The testator apparently had only an attested copy of this lease which he produced at the Land Registry. This copy and the assignment of the lease of No. 19 Brampton Road were indorsed by the Registrar in red ink with the words "as to 19 Brampton Road Land Registry London No. 122,528 Registered 30 April 1907."

The testator died on September 15, 1908, having appointed his wife Mary Theresa de Leeuw and his son Charles de Leeuw executors and trustees of his will and bequeathed to them (inter alia) the two houses in question upon trust to pay the rents to his wife for life and after her death to sell the houses and divide the nett proceeds of sale in equal shares among his six children of whom five were plaintiffs in this action and the sixth was his son Charles already mentioned. The will was proved by both the executors. On October 12, 1908, Mary Theresa de Leeuw and Charles de Leeuw (the son) were registered as proprietors of the two leasehold houses and were described in the Register as "executors of Charles de Leeuw deceased"; and entries were made in the certificates to the same effect. On January 30, 1913, a caution in favour of Mrs. de Leeuw was registered and entries of these cautions were also made in the certificates. The certificates thus showed that Mrs. de Leeuw and Charles de Leeuw (the son) were the registered proprietors of the two leases in the capacity of executors of the testator.

Mrs. de Leeuw left the management of the property to her son Charles, and the leases, the assignments and the land certificates were placed in his custody, as the learned judge found on the evidence, for him "to mind" and not to enable him to raise money. In May, 1916, an order was made in an action for administering the testator's estate in which Charles de Leeuw, the son, was a defendant, for payment by him into Court of a balance of certain moneys

and costs which appeared never to have been paid by him. Early in 1919 he was adjudicated a bankrupt.

In March, 1918, Charles de Leeuw (the son) went to the office of the defendant company and asked for a loan of 225*l.* He produced the lease of 11 Kenmare Road and the assignment of it to his father and the attested copy of the lease of Nos. 19, 21 and 23 Brampton Road, and the assignment of No. 19 Brampton Road to his father. He did not produce the probate of his father's will or the land certificates, nor did he inform the representative of the defendant company that the Charles de Leeuw named in the assignments was his father or that he was dead or that he himself and his mother were executors of his father's will. The company's representative thought that he was the Charles de Leeuw to whom the leases had been assigned in 1907, and in this belief the company advanced to him the sum of 225*l.* on the security of two mortgages of the two leasehold houses. By these deeds Charles de Leeuw in consideration of the sum of 225*l.*, paid to him, covenanted to pay to the company the sum of 292*l.* 10*s.* by weekly instalments, and as beneficial owner demised the leasehold houses to the company for the residue of the terms except the last day thereof respectively and declared that he would stand possessed of the nominal reversions in trust for the company and appointed the company's representative his attorney to assign the nominal reversions. The mortgages also contained restrictions on the mortgagor's power of leasing and covenants by the mortgagor to repair and insure.

In 1919 the instalments payable under the mortgages fell into arrear and in June of that year the company by their solicitor required payment of the amount due, and, as the result of an interview which he had with Charles de Leeuw, he obtained from him the land certificates which were in his possession. The solicitor then knew that Charles de Leeuw had personated his father and was one of two executors, and he realized that it was doubtful whether the mortgages were good as against the beneficiaries, but Charles de Leeuw assured him that the money was borrowed for

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executorship purposes and on this assurance the solicitor thought that it was a case of ignorance and not one of personation.

A representative of the defendant company subsequently called on Mrs. de Leeuw and his evidence was that she stated that she had given the leases to her son to enable him to raise money for repairs and rates and taxes and that, if a statement of what was due was sent to her, she would see what could be done. But as the result of the evidence at the trial of the present action Peterson J. said :—" I am not able to accept the accuracy of the statement that Mrs. de Leeuw said that she handed the leases to her son to enable him to raise money. I think that the deeds were, as Mrs. de Leeuw said, handed to her son ' to mind.' On the evidence, I do not doubt that Mrs. de Leeuw did not know that her son had in fact borrowed the sum in question from the defendant Company."

The defendant company then, on August 28, 1919, commenced foreclosure proceedings against Charles de Leeuw and Mrs. de Leeuw. On the evidence at the trial of the present action Peterson J. came to the conclusion that the writ in the foreclosure proceedings was served on Mrs. de Leeuw as well as on her son Charles who entered an appearance for himself and also for his mother but without her authority, and that they both received a copy of the statement of claim on these proceedings. No defence was delivered, and service of subsequent proceedings in that action was effected at the address for service given by the son when entering an appearance, which was not the address at which his mother was residing, and Peterson J. came to the conclusion that Mrs. de Leeuw did not have any actual cognizance of them. The following statement relative to the statement of claim and proceedings in the foreclosure action is taken from Peterson J.'s considered judgment in the present action :—

" The statement of claim alleged that the testator was registered as proprietor with a possessory title of the leaseholds in question, that the defendants were his executors and trustees and that they were registered as proprietors of the premises as executors of Charles de Leeuw deceased and

that the testator's estate had not been fully administered and that the executors had not assented to the bequest of the leaseholds. The last two allegations were apparently incorrect; for on the evidence it would appear that all the testator's debts had long since been paid and that Mrs. de Leeuw as tenant for life had for many years been in receipt of the rents. Para. 8 of the statement of claim alleged that Charles de Leeuw 'with the knowledge and consent' of Mrs. de Leeuw applied to the Company for a loan on the security of the leaseholds and that he deposited with the Company the assignments of the two leases to his father but 'concealed from the plaintiffs the fact that he was not the same person as the testator mentioned in such assignment' and that the title had been registered, and it asserted that 'such concealment as aforesaid was known to and authorised by the defendant Mrs. de Leeuw.' It may be observed that while Charles de Leeuw did not say that the title had been registered, the lease and the assignments which he handed to the Company bore on the face in prominent characters the statement that the title had been registered under the Land Transfer Acts.

"As to the allegation that Mrs. de Leeuw was a party to Charles de Leeuw's concealment, there is no reason for supposing that it has any foundation; nor is it easy to see what motive there could be for such a conspiracy, if, as the Company has contended in this action, the money was bona fide borrowed for executorship purposes. The statement of claim then alleged alternatively (1.) that the money was borrowed by the executors for the purpose of the executorship and that the mortgages were executed by Charles de Leeuw in the exercise of the powers conferred on him as executor and with the knowledge and consent of Mrs. de Leeuw and (2.) that if the loan was not raised by the two executors for the purpose of the executorship the concealment which was alleged was made fraudulently by the executors. There is in my opinion no ground for suggesting that Mrs. de Leeuw was a party to any fraud. I do not think that she had any knowledge that Charles de Leeuw intended to personate or had personated his

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father; nor, in my opinion, was she aware that her son proposed to raise the money in question on the security of these leaseholds, nor has it been shown in this action that the money was applied for the purposes of the estate; there is some that it was not."

"The 14th para. of the statement of claim stated in substance that the Company had only recently discovered that the Charles de Leeuw who executed the mortgages was not the beneficial owner of the property, and it was admitted by Counsel for the Company in the hearing of this action that the Company believed that the mortgages were executed by the Charles de Leeuw to whom the leases had been assigned in 1907."

"On the 23rd of January 1920 the usual decree for foreclosure nisi was made. The defendants did not attend on the taking of the account directed by the decree and on the 12th January 1921 the order absolute was made and in pursuance of that order the Company was entered on the Land Register as the proprietor of the leaseholds in question."

The Company then proceeded to advertise the properties for sale; and thereupon Charles de Leeuw's brothers and sisters made inquiries and when they had ascertained what had happened commenced the present action.

On May 30, 1921, the plaintiffs John de Leeuw and Ernest Jakens were appointed trustees of the will of the testator in place of Charles de Leeuw and Mrs. de Leeuw.

Charles de Leeuw was not called as a witness at the trial of this action.

Hughes K.C. and *C. A. Bennett* for the plaintiffs. Either Charles de Leeuw personated his father in executing these mortgage deeds, in which case they were forgeries: *In re Cooper* (1); or he obtained the advances in some character other than that of executor: *Solomon* v. *Attenborough*. (2) In either case the defendant company acquired no good title. That being so, the foreclosure order did not confer any better title on the mortgagees either by estoppel

(1) 20 Ch. D. 611. (2) [1912] 1 Ch. 451; [1913] A. C. 76.

or otherwise than they already had ; the effect of a foreclosure order is to take away the equity of redemption, and not to amend the mortgagee's remedy : Fisher on Mortgages, 6th ed., p. 506, § 988 ; *Anon.* (1) When the defendant company brought the foreclosure action it was known that the Charles de Leeuw that executed the mortgages was not the testator and was not beneficially entitled to the property. Order XVI., r. 8, will not avail the company because the executor or trustee did not, in the circumstances, represent the beneficiaries.

W. Arnold Jolly for the defendant company. The plaintiffs have failed to make out their case. The company took the mortgages on the understanding that Charles de Leeuw was the man named in the deeds, but there is no evidence of any personation. He admits that he borrowed the money as executor. The defendant executrix was an innocent party and sufficiently represented the beneficiaries in the foreclosure action, and judgment in that action estops the present plaintiffs ; the matter is res judicata ; Order XVI., r. 8. If they wished to upset that order their proper remedy was to proceed under Order XXVII., r. 15 : *Jacques* v. *Harrison.* (2) So long as this judgment has not been set aside it operates as an estoppel against the plaintiffs : *Cox* v. *Dublin City Distillery Co.* (3)

Apart from estoppel, there are no merits for disturbing these mortgages. The company did not know that Charles de Leeuw was an executor, but understood he was beneficially entitled. That was the point in *In re Morgan.* (4) In *Solomon* v. *Attenborough* (5) there was no legal estate at all ; it was a case of chattels. The company has got the legal estate as a purchaser for value without notice that the mortgagor was an executor. The memorandum of the Land Registry indorsed on the deeds was notice of registration but was no notice that the executors were registered. It is not enough to impute notice to the company to say that if the register had been searched the company would have had notice of

(1) (1678) 2 Ch. Ca. 244.
(2) (1884) 12 Q. B. D. 165.
(3) [1917] 1 I. R. 203.
(4) (1881) 18 Ch. D. 93.
(5) [1913] A. C. 76.

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the facts. The mere fact that a man is on the Register does not show that he has a good title because the legal estate can be dealt with off the Registry: *Capital and Counties Bank* v. *Rhodes.* (1) The company did not have actual notice nor did it avoid knowledge of the true state of the facts: *Agra Bank* v. *Barry* (2); nor was it guilty of gross negligence: *Ware* v. *Lord Egmont* (3); *Bailey* v. *Barnes* (4); *Hunt* v. *Luck.* (5) Failure to search the Registry will not postpone a bona fide purchaser or mortgagee without notice.

Moreover, the order for foreclosure absolute was a transfer for valuable consideration: *Huntington* v. *Inland Revenue Commissioners* (6) and *In re Lovell & Collard's Contract* (7), which, when registered, destroyed the plaintiffs' estate or interest by virtue of s. 35 of the Land Transfer Act, 1875, and the Land Transfer Rules 140 and 142.

Hughes K.C. in reply.

Cur. adv. vult.

April 12. PETERSON J. This is a curious case in which, owing to the defective character of some of the evidence, I have found some difficulty in arriving at a conclusion. In this action beneficiaries under the will of Charles de Leeuw (senr.) seek to establish that the mortgage created in favour of the defendant company and a foreclosure decree obtained by that company are invalid as against them. [His Lordship then stated the facts and the result of the evidence at the hearing of the present action, and continued:] The defence in the present action raises several questions. The company alleges: (1.) that it was determined in the foreclosure action that the loan was raised by Charles de Leeuw for executorship purposes and that the mortgages were executed by him in due exercise of the powers conferred upon him as executor and with the knowledge and consent of Mrs. de Leeuw, that by virtue of Order xvi., r. 8, of the Rules of the Supreme Court the present plaintiffs were represented in the foreclosure

(1) [1903] 1 Ch. 631.
(2) (1874) L. R. 7 H. L. 135.
(3) (1854) 4 D. M. & G. 460.
(4) [1894] 1 Ch. 25.
(5) [1902] 1 Ch. 428.
(6) [1896] 1 Q. B. 422.
(7) [1907] 1 Ch. 249.

action by the executors and that the present plaintiffs are estopped from disputing the validity of the foreclosure orders; (2.) that the present plaintiffs are estopped from denying the truth of the allegations referred to in (1.) and from alleging that the money was borrowed by Charles de Leeuw for his own purposes or that the mortgage was not executed by him in exercise of his powers as executor or with the knowledge or consent of Mrs. de Leeuw or that such mortgages were executed in fraud of the plaintiffs; (3.) that the company is a purchaser for value without notice; and (4.) the company relies upon the fact that it is the registered proprietor with a possessory title of the leaseholds.

It is clear, and indeed it is admitted, that the company, when the advance was made to Charles de Leeuw, was not aware that he was an executor and that the loan was made to him as the absolute owner of the leaseholds. The company cannot then rely upon the right of a lender to assume that an executor to whom an advance is made is acting properly within his powers; for the loan was not made to Charles de Leeuw as an executor: *Solomon* v. *Attenborough.* (1) If, as appears to be the case, the property had become vested in Charles de Leeuw and Mrs. de Leeuw as trustees, they had not, either separately or in conjunction, any power to mortgage it.

In my opinion the true conclusion from the evidence before me is that Charles de Leeuw borrowed the sum of 225*l.* from the defendant company for his own purposes and effected his object by fraudulently representing himself to be the person to whom the leases had been assigned; and that Mrs. de Leeuw took no part in the transaction and had no knowledge of it. In these circumstances, in executing the mortgages, he personated his father and his signature was a forgery: *In re Cooper.* (2) The result of this was that even if the property had not been vested in him and his mother as trustees, while he may be estopped from saying that the mortgages are not good as against his beneficial interest in the leaseholds, the deeds—apart from some considerations

(1) [1911] 2 Ch. 159. (2) 20 Ch. D. 611.

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with which I will deal—are void as against Mrs. de Leeuw and the other beneficiaries: *In re Cooper.* (1)

The question then arises what is the effect of the orders made in the foreclosure action. Mrs. de Leeuw, who is not a party to the present action, may be estopped from asserting that the mortgages are invalid as against her interest in the premises, as she has allowed judgment to go against her on the basis that the money was raised for executorship purposes and that the mortgages were executed by her son in the exercise of the powers conferred on him as executor and with her knowledge and consent: although it may be observed that the due exercise of his powers as executor cannot be said to include the deliberate concealment of the fact that he was not the same person as his testator the Charles de Leeuw who was the assignee of the leases. But the question is whether the beneficiaries who have been defrauded by Charles de Leeuw and who were not parties to the foreclosure action are bound by the decree in that action or whether they can assert that, notwithstanding the result of the foreclosure action, they are entitled to maintain that the two forged deeds are void as against them. The company relies upon the provisions of Order XVI., r. 8. Under this rule trustees, executors and others may sue and be sued as representing the property or estate of which they are trustees or representatives without joining the beneficiaries and are to be considered as representing the beneficiaries. The rule applies to trustees, executors, and others who are sued in proceedings to enforce a security by foreclosure: and it enables the Court at any stage of the proceedings to order any of the beneficiaries to be made parties. Before the addition of the words which make this rule applicable to trustees and legal personal representatives in foreclosure actions, it was necessary in a foreclosure action to join the beneficiaries as defendants: *Francis* v. *Harrison* (2); and the addition was made in order to avoid the unnecessary expense and delay of joining beneficiaries whose interests were sufficiently represented by trustees or executors or others. The

(1) 20 Ch. D. 611. (2) (1889) 43 Ch. D. 183.

rule may be compared with Order XVI., r. 9, which enables one or more persons of a numerous class to sue or be sued on behalf of or for the benefit of the class. In ordinary cases, no doubt, a judgment in an action against trustees is under r. 8 binding upon the beneficiaries and in the Irish case of *Cox* v. *Dublin City Distillery Co.* (1) this view prevailed, although the trustees had not put in a defence. I do not think that this proposition could successfully be disputed where the trustees in fact represented their cestuis que trust. But there are cases in which the trustees do not represent the interests of their beneficiaries. For instance, executors may mortgage part of their testator's estate to secure a sum which they have borrowed for their own purposes and the lender may have notice of facts which show that the money is being borrowed for illegitimate purposes. It would be a startling result of r. 8 if a judgment obtained by the lender against the executors in a foreclosure action in which the Statement of Claim alleged that the money had been borrowed for executorship purposes, and the executor's defence was that this allegation was binding upon the beneficiaries, and estopped them from establishing their rights. In such a case the protection afforded by the power to require the beneficiaries to be joined as defendants would be of little use, as the Court would not know of the facts which rendered it proper for the beneficiaries to be joined; and that power cannot under the rule be exercised after the proceedings have come to an end. So too a trustee without power of sale might contract to sell part of the trust estate and submit to judgment in an action for specific performance. Could the purchaser relying upon this judgment accept the title of the trustee and take a conveyance and then successfully contend that by virtue of r. 8 the beneficiaries were estopped from asserting that the sale was a nullity? If, as in this case, the beneficiaries had not any knowledge that the action was pending, they could not avail themselves of the right to be added as parties under the provisions of this rule, and although the real question in the action was whether the act

(1) [1917] 1 I. R. 203.

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of the trustees was binding upon the estate the beneficiaries might find themselves deprived of their property by an act of the trustees which was invalid against them without having had any opportunity of challenging it. In my opinion Order XVI., r. 8, is directed to cases in which the trustee or executor who is sued does in fact represent the beneficiaries whose interests it is his duty to protect and was never intended to apply to a case in which the beneficiaries had solid ground for impeaching a transaction between a fraudulent trustee or executor and the plaintiff. In such a case the question is not merely one between the plaintiff and the estate, but is also one between the beneficiaries on the one hand and the trustees and the plaintiff on the other hand. The plaintiff might no doubt have acquired rights against the trustees; but the real question would be whether the act of the trustees had conferred any rights upon the plaintiff against the property of the beneficiaries. In cases of this description the trustees do not represent their beneficiaries; their interests are divergent or opposed, and I cannot accept the view that in such cases where beneficiaries have not had an opportunity of intervening, they are precluded from establishing their rights by a judgment against the trustees in an action in which the trustees have not put in a defence or have put in a defence which admitted the plaintiff's claim. In the foreclosure action in the present case the company alleged that the sum in question had been raised by the executors for the purposes of their executorship and that the mortgages were executed by Charles de Leeuw in due exercise of the powers conferred upon him as executor and with the knowledge and consent of Mrs. de Leeuw, and alternatively that the two executors had been guilty of fraud. The issue raised was whether the executors had given to the company mortgages which bound the property to which the beneficiaries were entitled and, if not, whether the executors were liable to the company in damages for fraud. The statement of claim shows that the company was aware that the mortgages might be open to challenge by the beneficiaries; and this is confirmed by the claim for a declaration

that under and by virtue of the two mortgages the company was entitled to a mortgage on the leaseholds for securing the payment by the executors to the company of the amount remaining unpaid. As the real question in the action was whether the acts of the executors were valid as against the beneficiaries it could not, in my opinion, be determined in the absence of the beneficiaries so as to bind them. In my view then the present plaintiffs are not bound by the judgment in the foreclosure action and, if they are not, it is impossible to hold that they are estopped from alleging that the mortgages are invalid against them and that the money was borrowed by Charles de Leeuw for his own purposes and that the mortgages were not executed by him in exercise of his powers as executor or with the knowledge or assent of his mother.

It was then contended that the company was a purchaser for value without notice. It was said that the company was not aware that Charles de Leeuw was not the beneficial owner of the leases. I agree that the company's representatives believed that Charles de Leeuw was the Charles de Leeuw to whom the leases had been assigned and that they did not know that the mortgagor was an executor of the assignee. But if these mortgages were forgeries and void as against everyone except the Charles de Leeuw who executed them, I fail to see how the question of whether the company was purchaser for value without notice arises. A purchaser for value without notice is one to whom property has been conveyed without notice of the rights of other persons in it. But these deeds were altogether void except, by estoppel, against Charles de Leeuw. They did not pass any estate or interest which was capable of being protected by such a plea. But if the question had to be determined, the company, in my opinion, had notice of the fact that Charles de Leeuw was one of the executors and was not the assignee of the leases under the deeds of 1907, or the beneficial owner of the property. The leases and the assignments bore on the face of them the statement that they had been registered in the Land Registry, and the company's representative could

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not have failed to see it. Any reasonable person who found that the property was on the Land Register would inspect the register and require that the land certificates should be handed to him before he accepted the title, and in my opinion would be guilty of very great negligence if he did not do so. If the land certificates had been produced or if the register had been inspected the real position of Charles de Leeuw would necessarily have been discovered. Whether the question of notice is determined by s. 3 of the Conveyancing Act, 1882, or by the law as expounded in the well-known judgment of Wigram V.-C. in *Jones* v. *Smith* (1), the result appears to me to be the same. The company had actual notice that the property was registered in the Land Registry and is bound by constructive notice of the facts which it could have ascertained if it had inspected the register or indeed had taken the obvious course of requiring the land certificates to be handed to it.

There remains the contention that as the company has been entered on the Land Register as proprietor with a possessory title, in pursuance of the order for foreclosure absolute, it has a title under the Land Transfer Acts which the plaintiffs cannot impeach. This contention involves the proposition that, although the order by virtue of which the company was placed on the Register is not effectual against the plaintiffs, their rights are defeated by the registration which has been effected in accordance with the order. The argument in support of this contention was based upon rr. 140 and 142, of the Land Transfer Rules and s. 35 of the Land Transfer Act, 1875. Rule 142 provides that: "a transfer for valuable consideration of leasehold land registered with a possessory title shall, when registered, have the same effect as a transfer for valuable consideration of the same land registered with an absolute title, save that the transfer shall not affect or prejudice the enforcement of any right or interest (whether in respect of the lessor's title or otherwise) adverse to or in derogation of the title of the first registered proprietor, and subsisting or capable of arising at the time of the registration

(1) (1841) 1 Hare, 43.

of such proprietor." Rule 140 provides that "a transfer for valuable consideration of leasehold land registered with an absolute or qualified title shall, when registered, have the effect given by s. 35 of the Act of 1875 to such a transfer of leasehold land registered with a declaration that the lessor had an absolute title to grant the lease," subject to an exception which for present purposes is immaterial. Sect. 35 of the Act of 1875 enacts that a transfer for valuable consideration of leasehold land registered with a declaration that the lessor had an absolute title to grant the lease shall, when registered, be deemed to vest in the transferee the possession of the land transferred for all the leasehold estate described in the registered lease subject to certain covenants, liabilities, incumbrances, rights and interests which need not be mentioned "but free from all other estates and interests whatsoever." It is said that the order for foreclosure absolute is a transfer for valuable consideration and that when it was registered it destroyed the plaintiffs' estate or interest by virtue of the final words of s. 35. Two cases were cited for the purpose of establishing that the order for foreclosure absolute was a transfer for valuable consideration: *Huntington* v. *Inland Revenue Commissioners* (1) and *In re Lovell and Collard's Contract.* (2) By the former of these two cases it was determined that where a mortgagor in pursuance of an order for foreclosure absolute conveys all his estate or interest in the mortgaged property to an equitable mortgagee the conveyance is a "conveyance on sale" within the meaning of s. 54 of the Stamp Act, 1891. In *In re Lovell and Collard's Contract* (2) it was held that an order for foreclosure absolute of a legal mortgage required to be stamped as a "conveyance on sale." Both these decisions turned upon the provisions of the Stamp Act, 1891. Sect. 54 of that Act declares that for the purposes of the Act the expression "conveyance on sale" includes every decree or order of any Court whereby any estate or interest in any property upon the sale thereof is transferred to or vested in a purchaser. Sect. 57 provided that where any property is conveyed to any person in

(1) [1896] 1 Q. B. 422. (2) [1907] 1 Ch. 249.

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consideration of any debt due to him, whether being or constituting a charge upon the property or not, the debt is to be deemed the consideration in respect whereof the conveyance is chargeable with ad valorem duty. After the decision in *Huntington* v. *Inland Revenue Commissioners* (1), s. 6 of the Finance Act, 1898, "for the removal of doubts" declared that the definition of conveyance on sale in s. 54 of the Act of 1891 included a decree or order for foreclosure. It was by virtue of the provisions of these Acts that an order for foreclosure was for the purposes of the Acts a conveyance. But these decisions do not help me to determine what is "a transfer" within s. 35 of the Land Transfer Act, 1875, and the Land Transfer Rules. Sects. 34 to 39 deal with the "transfer of leasehold land," as ss. 29 to 33 relate to the "transfer of freehold land." Sect. 34 provides that every registered proprietor of leasehold land may transfer it in the prescribed manner and that the transfer shall be completed by registration of the transferee as proprietor, but that until registration the transferor is to be deemed the proprietor. The manner in which leasehold land may be transferred is prescribed by r. 138. This rule provides that a transfer of leasehold land shall be made by an instrument in Form 35 in the first schedule to the rules. The form prescribed is as follows: "In consideration of *l.* I A.B. of &c. hereby transfer to C.D. of &c. the land comprised in the title above referred to for the residue of the term granted by the registered lease." Sect. 34 plainly contemplates an instrument by which the registered proprietor transfers his estate to another person. In my opinion the words "a transfer" in s. 35 mean a transfer of the kind contemplated and authorized by s. 34 and that section does not cover the case of an order for foreclosure. This conclusion is I think supported by a reference to s. 39. That section provides that on the transfer of any leasehold land under the Act, unless there be an entry on the register regulating such implication there shall be implied on the part of the transferor a covenant with the transferee that notwithstanding anything by such

(1) [1896] 1 Q. B. 422.

transferor done, omitted, or knowingly suffered, the rent, covenants and conditions reserved and contained by and in the registered lease and on the part of the lessee to be paid, performed and observed have been so paid, performed and observed up to the date of the transfer. The result of this section, if the defendants' contentions are correct, would be that the mortgagor would be liable to indemnify the mortgagee against all breaches of the covenants in the lease committed by the mortgagor before the order for foreclosure absolute.

The plaintiffs ask that the Register may be rectified by inserting in it the names of the present trustees as the proprietors of the two houses in question. The power of the Court to direct rectification of the Register is contained in ss. 95 and 96 of the Land Transfer Act, 1875, and s. 7, sub-s. 2, of the Land Transfer Act, 1897. Sect. 7, sub-s. 2, of the Act of 1897 does not appear to apply to the present case. The words "a registered disposition" probably mean a registered transfer or a registered charge. If they do, then for the reasons which I have already indicated they do not include an order for foreclosure. If they include an order for foreclosure then it is impossible to say that the order for foreclosure in the present case is "absolutely void." But in my opinion ss. 95 and 96 confer upon the Court ample power to direct rectification of the Register in the present case: see *Capital and Counties Bank* v. *Rhodes*. (1) The opening words of these sections do not prevent the application of the sections to cases in which a person has been improperly registered as proprietor.

I am therefore of opinion that the plaintiffs are entitled to a declaration that the order for foreclosure is not binding upon them and to an order that the plaintiffs John de Leeuw and Ernest Jakens who are the present trustees of the will of the testator be entered on the Register as proprietors of the leasehold hereditaments known as 11 Kenmare Road and No. 19 Brampton Road. The company may under the foreclosure decree be entitled to the beneficial interests

(1) [1903] 1 Ch. 631, 657.

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of Mrs. de Leeuw and Charles de Leeuw; but, if there is any question on this point, it cannot be determined in this action.

Solicitor for the plaintiffs: *F. W. Perkins.*
Solicitor for the defendants: *Matthew H. Hale.*

R. M.

P. O. LAWRENCE J. 1922 *April* 6; *May* 15.

In re GALSWORTHY.

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[1922. G. 409.]

Will—Forfeiture on Alienation—Settlement on Wife and Children excepted—Wife past the Age of Child-bearing—Post-nuptial Settlement on Wife for Life, Remainder to Children by her, Remainder to her absolutely—Settlement on Wife alone—Powers of Appointment Act, 1874 (37 & 38 *Vict.* c. 37).

A testator, who died in 1920, bequeathed certain interests to his children, subject to forfeiture upon alienation, except any alienation by way of settlement upon a husband or wife and children either before or after marriage. The plaintiff, one of the testator's children, who had married in 1892 H. M. G., and of which marriage there had been and, on account of the ages of the spouses, there could be no issue, proposed to settle his interests under the will in favour of his wife, H. M. G., for life, with remainder to the child or children, if any, of the said marriage living at her death, with remainder to H. M. G. absolutely:—

Held, that such a settlement, although in form a settlement on the wife and children, yet, in the circumstances, was in effect a settlement on the wife alone: but that, as on the true construction of the exception from the forfeiture clause, the plaintiff was entitled to select his wife to the exclusion of the children, the settlement would not create a forfeiture.

ADJOURNED SUMMONS.

By his will, dated April 29, 1918, Sir Edwin Henry Galsworthy after appointing his son Edwin Henry Galsworthy and his daughter Laura Louise Galsworthy to be the executors and trustees thereof and after bequeathing certain annuities, gave his real and residuary personal estate to his trustees upon trust for sale and conversion. By clause 13 thereof

he provided for the payment and application of the income of his residuary estate until the death of his wife or the expiration of ten years from the testator's death, which should last happen (such period being referred to in the will as "the period of suspense"). By clause 14 he provided that at the expiration of two years from his death his trustees should raise 40,000*l.* and divide the same amongst his children then living in equal shares, such amount being liable to be increased or decreased in certain events therein mentioned. By clause 19 the testator directed that at the end of the period of suspense his trustees should hold his then remaining residuary estate, subject as aforesaid, in trust to divide the same equally amongst his children then living. By clause 20 it was provided that, if any of his children should before the end of the period of suspense assign, charge or incumber his or her vested contingent or expectant share or shares or interest of and in his residuary estate or the income thereof, on any part thereof, or become bankrupt or do or suffer any act or thing or any other event should happen whereby the share or shares of such child or any part thereof would, but for that clause, become vested in or payable to any other person or persons, "save and except only on alienation by way of settlement upon a husband or wife and children of a child or grandchild of mine either before or in contemplation of or subsequent to his or her marriage," then and in such case all the trusts and provisions in favour of such forfeiting party should cease and determine as if he or she had died at the time when such cause of forfeiture occurred.

The testator died on December 21, 1920, leaving property of the value of more than 300,000*l.* and leaving his wife and, besides other children, the plaintiff Alfred Rowland Galsworthy, surviving him.

The plaintiff was married to his present wife, Harriet Margaret Galsworthy, on December 24, 1892. There had been no issue of that marriage and the present ages of the spouses were fifty-seven and sixty-seven years respectively.

In June, 1921, the plaintiff, being desirous of making a

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settlement of 20,000*l.* part of the interests in the 40,000*l.* and the remaining residuary estate to which he was contingently entitled under clauses 14 and 19 of the will took out an originating summons: *In re Galsworthy* (1921. G. 1693), asking whether upon the true construction of the will he was entitled, without forfeiting his interests thereunder, to alienate the same by way of settlement upon trusts in favour of himself for life, and after his death in favour of his wife Harriet M. Galsworthy for her life, and after the decease of the survivor of them in favour of himself absolutely, "without introducing trusts in favour of the children, if any, of his marriage with his said wife or any future wife with whom he may marry on the footing that there can be no issue of his present marriage." The question came before P. O. Lawrence J. on July 5, 1921, and he held that the settlement proposed would not come within the exception from the forfeiture clause in the will, because the proposed settlement was one upon the plaintiff himself, and, having regard to the age of the plaintiff's wife, it was not possible to make a settlement on the children of that marriage: And it was declared that the plaintiff had no power, without creating a forfeiture, to settle his interests in the manner proposed without introducing trusts in favour of the children mentioned in the summons. The plaintiff appealed from that judgment, and on November 17, 1921, the Court of Appeal affirmed the decision of P. O. Lawrence J., but that Court directed that his judgment should be varied by omitting therefrom the words stated above within inverted commas, on the ground that such an expression of opinion on the part of the learned judge was unnecessary, and ought not to stand in the way of any fresh proposals for a settlement which might be made by the appellant.

The plaintiff, accordingly, took out this second summons against the trustees of the will, for the determination of the question whether upon the true construction of the will he had power, without creating a forfeiture of his aforesaid interests thereunder, to settle 20,000*l.* part of his aforesaid interests in trust for his wife Harriet for her life, and after

her death for the child or children, if any, of the said marriage, with an ultimate trust, in default of children, for his said wife absolutely.

In order to explain the references made by P. O. Lawrence J. in his judgment on the present summons to the judgments of the Court of Appeal when the first summons came before it, the parts of those judgments material for that purpose are stated below. (1)

Ward Coldridge K.C. and *Whitmore Richards* for the plaintiff. The proposed settlement satisfies the requirements of the exception and is valid. This is not a case of a settlement upon marriage, as was the settlement the Court was dealing with in the case of *In re Gowan.* (2) The will gave power to the plaintiff to make a settlement upon his wife and children treating them as one class: *Kingsbury* v. *Walter.* (3) He was entitled to select his wife as a member of the class to the exclusion of the children and settle his interest on her alone. By analogy to the Act (37 & 38 Vict. c. 37) the settlor would be entitled to exclude one or more objects of the class. If there were any children in esse, the plaintiff clearly might select amongst the objects, and the impossibility of children makes no difference. Supposing the converse case of no wife but several children, a widower might in such a case make a valid settlement on a child or children. If this is not an exercise of a power, it is an exercise of a proprietary right. The plaintiff has contingent interests under the will subject to a fetter upon his power of disposition; and upon the proper construction of the forfeiture clause, he may select any one or more objects of the class.

Owen Thompson K.C. and *Ashton Cross* for the defendants, trustees of the will. The proposed settlement is in effect a settlement on the husband, since it enables him to control the fund, the very thing which the forfeiture clause was inserted to prevent. If such a settlement is within the exception, it enables the husband to evade the forfeiture

(1) Post, p. 567n. (2) (1880) 17 Ch. D. 778.
(3) [1901] A. C. 187.

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clause. But such a settlement would work a forfeiture of the plaintiff's interests under the will. A settlement on the children of the plaintiff's present marriage is illusory, because there are no children and, having regard to the age of his present wife, there cannot be any; moreover, the settlement contains no provision for children, if any, of the plaintiff's future marriage. Children by a future marriage ought to be provided for with a power to select amongst children of any marriage: for the proper form of settlement see *In re Gowan.* (1)

[*Cogan* v. *Duffield* (2) was also referred to.]

P. O. LAWRENCE J. In this case the plaintiff is entitled to certain interests under the will of his father, which I need not further particularise for the purpose of this judgment. These interests are contingent, partly upon his surviving a period of two years and partly upon his surviving a period of ten years. Neither the two years' period nor the ten years' period has yet elapsed. In the will there is a clause by which he and other beneficiaries under the will forfeit their shares in the event of alienation before the period of suspense has elapsed. From such alienation there is excepted "any alienation by way of settlement upon husband or wife and children of a child or a grandchild of the testator either before or in contemplation of or subsequent to his or her marriage." The plaintiff now proposes to make a settlement of part of his contingent share upon his wife for life, with remainder to his children by her who should be living at her death, with remainder to the wife absolutely. The plaintiff was married to his present wife in December, 1892, and has had no issue by her. He is now fifty-seven years of age and she is ten years older than he is, and therefore long past child-bearing. Before the plaintiff executes the proposed settlement, he asks the Court to determine whether such settlement, if executed, would work a forfeiture of his interests under the will. The avowed object of this settlement is to enable the plaintiff and his wife to raise for their joint benefit a sum of money

(1) 17 Ch. D. 778. (2) (1876) 2 Ch. D. 44.

on the security of his wife's interest under the settlement, coupled with a policy on the life of the plaintiff, which would mature in case he died before the period of suspense.

Now there can, I think, be no doubt that the object of the forfeiture clause is to prevent the testator's children from anticipating their shares in the testator's estate, and the trustees of the will contend that the proposed settlement is contrary to the spirit, if not to the letter, of the will, and would work a forfeiture. On a recent application the plaintiff asked me to determine whether a settlement upon himself for life, with remainder to his present wife for life, with remainder to himself absolutely, would work a forfeiture or not, and on that application I held that the proposed settlement would work a forfeiture. The summons on that occasion did not simply ask me to decide whether the contemplated settlement would work a forfeiture or not, but went on to ask whether that settlement would work a forfeiture, unless there were introduced trusts in favour of the children, if any, of the plaintiff's marriage with his present or any future wife, on the footing that there could be no issue of his present marriage. That further question led to an argument before me, as to whether the plaintiff, in the events which had happened, could execute any settlement falling within the exception to the forfeiture clause without providing for the possible children of any subsequent marriage of the plaintiff, and I expressed my opinion upon that point. The matter came before the Court of Appeal, and that Court held that I was wrong in thus expressing my opinion, and that my order should not stand in the way of the plaintiff bringing forward any proposals for a settlement, which did not in fact provide for the possible children of a future marriage. Accordingly the Court of Appeal varied my order by striking out any reference to the introduction of trusts in favour of the children of the present or any future marriage. The plaintiff now comes with the proposed settlement, the trusts of which I have indicated, and asks me to determine whether such a settlement would be one which would fall within the exception contained in the forfeiture clause, and

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Mr. Ward Coldridge has contended on his behalf that the Court of Appeal has decided that such a settlement would not work a forfeiture. If I could persuade myself that the Court of Appeal had so decided, I should, of course, be bound by that decision, and should be relieved from expressing my own opinion upon the point. But on looking at the judgments of the members of the Court of Appeal I find that, although each member expressed a view which was different from the view I took on the former occasion, yet I think each member made it perfectly clear that the opinion expressed by him was not a concluded opinion, but was open to be changed by further argument: indeed, had it been a concluded opinion by all the members of the Court, they would in effect have done that which they held I was wrong in doing—namely, given a concluded opinion upon a point which was not then before them. I have now had the advantage of further argument upon the point, and, as I am bound to express my own opinion upon it, I will endeavour to do so and to state the reasons for the conclusion at which I have arrived.

In the first place, I am of opinion that, in the events which have happened, the proposed settlement is in substance and in fact a settlement on the plaintiff's wife alone, as she has no children at present and cannot have any hereafter. The insertion of the child or children of the present marriage in the settlement is, in my judgment, a mere matter of form, and does not alter the true nature and effect of the settlement. If that be the true view, the first question which arises is whether the exception in the forfeiture clause is wide enough to include a settlement upon the wife alone. Mr. Ward Coldridge has argued that the exception in the forfeiture clause is in the nature of a power, and that therefore the first section of the Powers of Appointment Act (37 & 38 Vict. c. 37) applies, so as to enable the plaintiff to make a settlement excluding any one or more of the objects mentioned in the exception. Now, if the exception could be construed as conferring upon the plaintiff a power within the meaning of that Act, I agree that there would be no difficulty, as the wife would be one of the objects of the power, and s. 1 of

the Act authorizes an appointment to one of several objects. In my judgment, however, the forfeiture clause does not confer any power upon the plaintiff within the meaning of the Act. The forfeiture clause in my opinion merely acts as a fetter upon the ordinary proprietary right of the plaintiff to alienate his interests under the will, from which fetter there is excepted a particular kind of alienation. Accordingly, any settlement made by the plaintiff under the exception is made by him in exercise of his dominion over the interest which he takes; in other words, is made in exercise of the ordinary proprietary rights which every owner of property has and not in exercise of any power conferred upon him by the will. I therefore hold that the Act has no application.

This decision does not, however, conclude the case. The question which remains to be determined is whether the exception properly construed enables the plaintiff to exercise his right of settlement in favour of his wife to the exclusion of any children. Mr. Owen Thompson has argued that under the exception the only settlement which the plaintiff could execute, so as not to create a forfeiture, is such a settlement as the Court would have approved had the will directed a settlement to be made on his wife and children, and he has referred me to *In re Gowan* (1), as showing that in such a settlement the Court would insist on the inclusion of all the children of the plaintiff by his present or any future wife in such a manner as to give every child of his by any wife at all events a chance of taking an interest in the property to be settled. In my judgment that is not the right view. Having had the benefit of further argument and for the reasons hereinafter stated, I have come to the conclusion that the exception does enable the plaintiff, without incurring a forfeiture, to settle his interest upon his wife in the manner proposed, and that it would be taking too narrow a view of the construction of the exception to hold that the proposed settlement does not fall within it, especially where the settlor has no children. Mr. Owen Thompson at one stage of his argument admitted that he could not contend that,

(1) 17 Ch. D. 778.

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if the plaintiff had been a widower with children, a settlement by him on those children would have created a forfeiture. Of course, he is not bound by any such admission, as this is a pure question of construction and moreover one upon which different views may very well be taken, and upon which views may change. I have, however, been given a considerable lead by the opinions expressed by the Master of the Rolls and the Lords Justices in the Court of Appeal. As already stated, none of those opinions were final, but they were stated with no uncertain voice. Warrington L.J. stated that in his opinion the settlor could settle in favour of some or one of his children, to the exclusion of the others and particularly in favour of a class of children at twenty-one to the exclusion of any child or children who did not attain that age. If that be the true view and the plaintiff could have exercised a right of selection under a settlement in favour of one child to the exclusion of the others, it seems difficult logically not to conclude that he could have selected among all the objects mentioned in the exception—namely, the wife and children—and made a settlement in favour of any one of those objects (e.g., the wife). Lord Sterndale M.R. and Younger L.J. evidently did not agree with the opinion expressed by me on the former occasion, that, in the events which have happened, the plaintiff could make no settlement which would not create a forfeiture without providing for children of a future marriage. The opinions of the learned judges show that they considered that the exception enables the settlor without incurring a forfeiture to make a settlement on his wife alone. It is true that Younger L.J. speaks of a settlement in favour of the wife and children of the marriage, but knowing that there could be no such children, I think that the learned Lord Justice must have meant to indicate that in his opinion a settlement in the form now proposed would not operate to create a forfeiture. If the settlor, being a widower with children, could settle on those children without providing for a possible future wife, I ask myself, why could not a settlor, having no children but having a wife, settle the property on the wife without providing for possible future children?

It seems to me to follow logically that he could do so. Again, if the settlor has a power of selection amongst his children, I ask myself, why could not he logically have a power of selection amongst his children and his wife? On the whole, therefore, I have come to the conclusion that the settlement which is now proposed conforms both to the letter and the spirit of the exception contained in the forfeiture clause and will not work a forfeiture.

I further am of opinion on reflection that it is no concern of mine to inquire what the lady, upon whom this fund is going to be settled, proposes to do with her interests under the settlement when she has acquired them. I find as a fact, having heard the evidence given by the plaintiff in the witness box, that there is no concluded bargain between the spouses that the wife shall hand to him any part of the proceeds of the money which it is proposed to raise. In the result I hold that the proposed settlement is a bona fide settlement in favour of the wife and that it falls within the exception from the forfeiture clause.

Solicitor: *Edward Betteley.*

H. C. H.

NOTE.—WARRINGTON L.J., after agreeing with the Master of the Rolls that P. O. Lawrence J. was right in declaring that the plaintiff had no power, without creating a forfeiture, to settle his interests under the will in the manner proposed continued as follows: "But he was invited to go further, and to say whether or not the omission of a provision for children or the insertion of a provision for the children only of the appellant's then marriage would render the settlement not within the exception of the forfeiture clause, and he expressed the opinion that such provisions in the settlement would not exempt the settlement from the forfeiture clause. With all respect, that part of the learned judge's decision was, in my opinion, unnecessary. What he really had to decide was whether the then proposed settlement would work a forfeiture or not, and, having decided that, there was nothing more which it was necessary for him to decide: but being invited to express an opinion upon that, he inserted at the end of the order these words: [The Lord Justice then read the words stated above between inverted commas.] The case has not been fully argued, because, when it was suggested that those words were unnecessary and ought to be struck out of the order, that was assented to by Mr. Clauson on behalf of the trustees. I agree with the Master of the Rolls that the expression of opinion of the learned judge on that part of the case ought not to stand in the way of any fresh proposals for a settlement, which may be made by the appellant. I think that I cannot

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go further than that. So far as I am personally concerned, at the present moment, without hearing a good deal more argument upon it than we have heard, I do not assent to the view of the learned judge in that respect. When the testator says 'the settlement on a wife and children,' he means, I think, settlement on the wife and children, 'if any,' or settlement on the wife and such children as the settlor may select. For example, could it possibly be said that the way in which this exception is framed would prevent him from making a settlement upon such of his children as should attain twenty-one, so distinguishing them from those that should die under that age? It seems to me that that would reduce the matter to an absurdity."

YOUNGER L.J. [after expressing his opinion that the order appealed against was technically right, said:] "But when one hears the way in which this order was evolved, and when one realises that the order, as it stands, represents the actual opinion of the learned judge namely, that a settlement which contained any of these provisions, not all of them, but any of them, would be bad, then different questions altogether arise. When I speak of a settlement containing any of these provisions being bad, I do so advisedly, because I understand the learned judge, to have expressed the opinion that, although it was essential that a settlement, to save the interests from forfeiture, should contain provisions for the benefit of the children of the marriage, and that, unless it did contain these provisions, the settlement would work a forfeiture, the insertion of provisions for the children of this marriage would not save this settlement, because there could not be any. The result on this view would apparently be that you could not in present circumstances, and although there is a wife living, make any settlement which would not work a forfeiture, whatever you said about children of the marriage. Also, it appears, although not quite so clearly, that the learned judge might have been of the opinion that a settlement which did not provide for the children of a future marriage would also be a settlement which would work a forfeiture. As at present advised—I say no more, the matter not having been fully argued—I cannot assent to either of these views. As at present advised, the mere fact that, owing to the age of the wife, it is not possible that there can be any children of this marriage, does not in my opinion prevent a settlement being made now, within the meaning of this will, which will avoid a forfeiture. Also, as at present advised, I am of opinion that it is not required by the provisions of this will that a settlement now made and executed so as to avoid forfeiture need say anything at all about the children of the settlor by a future marriage."

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[1921. H. 5122.]

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May 29; *June* 13.

Will—Legacy—Specific or general—Legacy of "the" Stocks Shares and Securities particularised in Schedule.

A testatrix bequeathed to each of the persons named in a schedule to her will "the" stocks shares and securities particulars whereof were in the schedule set opposite to his or her name. She also bequeathed to A. C. S. "the" stocks shares and securities particulars whereof were set forth in another schedule thereto. The first schedule comprised Indian investments and included shares in a number of industrial concerns in India. The other schedule comprised English investments and included shares in a number of industrial concerns in England.

The testatrix was at the date of her will possessed of investments corresponding in every detail both as to amount and description with the investments described in the two schedules:—

Held, that the legacies were specific and not general legacies.

ADJOURNED SUMMONS.

Mary Louise Hawkins, widow, by her will dated Nov. 8, 1918, which was drawn in numbered paragraphs, with schedules, appointed the Public Trustee and her adopted nephew, Frederick William Richter Hawkins, to be trustees and executors thereof. In paras. 3, 4 and 5, the testatrix dealt with her wearing apparel and her articles of personal domestic or household use or ornament. Para. 4 was as follows: "I bequeath to each of the persons named in the first column of the First schedule to this my will the article or articles set opposite to his or her name in the second column of the said First schedule." Para. 6 was as follows: "I bequeath to each of the persons named in the first column of the Second schedule hereto *the* stocks shares and securities particulars whereof are set opposite to his or her name in the second and third columns of the said schedule hereto."

Para. 7 was as follows: "I bequeath to my cousin Amy Constance Shaw *the* stocks shares and securities particulars whereof were set forth in the Third schedule hereto." The

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testatrix in paras. 10, 11 and 12 gave the residue of her property to her trustees upon trust to sell and call in the same and directed that her trustees should out of the proceeds pay (inter alia) the legacies given by her will (which together amounted to 500*l.*) and stand possessed of the residue in trust for Frederick W. R. Hawkins and her nephew James Bruce Morgan in equal shares.

The second schedule contained in the first column the names of the legatees—namely, James Bruce Morgan, Frederick W. R. Hawkins, Charles Vaid, and Thomas Hill, and the second column contained the names of the companies and the third column was headed "Description of the stocks shares or securities in such company." That schedule comprised twenty-three items of Indian investments consisting, for the most part, of investments in industrial concerns in India, and those investments corresponded in every detail both as to amount and description with the Indian investments which the testatrix held at the date of her will. The third schedule contained in its first column the names of the companies, and the second column was headed "Description of stocks shares or securities in such company," and comprised eighteen items of English investments consisting, for the most part, of investments in industrial concerns in England. Those investments corresponded in every detail both as to amount and description with the English investments which the testatrix held at the date of her will, except that some National War Bonds and certain valueless bonds and shares which she then held were omitted.

The testatrix died on November 27, 1920, and she was then still possessed of all those investments described in the second and third schedules, except seven of them.

Questions arose as to those seven items of investment—namely: whether, if they were specifically bequeathed, they or any of them had been adeemed by the testatrix in her lifetime; and accordingly, this summons was taken out by the Public Trustee against the defendants Amy Constance Shaw, Thomas Hill, James Bruce Morgan and Frederick W. R. Hawkins (the other trustee) as legatees

thereof, the two last-named defendants being also residuary legatees under the will, for the determination of the questions: (1.) whether they were specific or general legacies, and, in case any of them should be declared to be specific, (2.) whether such legacy had been adeemed. The first question alone is material for the purpose of this report.

Dighton Pollock, for the trustee.

Errington, for the defendant Amy Constance Shaw. The bequests of the investments in the third schedule are general and not specific. A gift of a sum of stock is a general legacy, unless there is something on the face of the will to make it specific. A bequest of a sum of stock, even though expressed in pounds, shillings and pence, being the exact amount of the stock possessed by the testator at the date of his will, is a general legacy: *In re Willcocks.* (1) The fact that here there are many such legacies is not sufficient to alter the principle. There is not sufficient indication on the face of the will that the testatrix is referring to the investments which she then possessed.

F. K. Archer, for the defendant Frederick W. R. Hawkins. The bequests of the investments in the second schedule are specific. The introduction of a schedule into the will cannot affect the question. It is not disputed that a gift of the precise amount of stock possessed by a testator at the time he makes his will is not specific, but is general. But as Rigby L.J. said in *In re Nottage* (2): "You have got a long way towards a specific gift if you come to the conclusion that he is trying to describe something which he has." The gift here is of "the" stocks, etc., in the schedule, like the preceding gift of "the" chattels; it is not a gift of the "sums of" stock in the schedule. When the gifts, as they are here, are of a large number of investments of various and rather special descriptions and exactly corresponding as to their amounts and in all other respects with those which the testatrix possessed at the time she made her will, the evidence from those circumstances that she must have intended to

(1) [1921] 2 Ch. 327. (2) [1895] 2 Ch. 657, 664.

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bequeath those very investments is as strong as if she had used the possessive pronoun "my."

[He also referred to *Bothamley* v. *Sherson*. (1)]

Harman for the defendant Thomas Hill.

J. G. Wood, for the defendant James Bruce Morgan, supported the arguments that the legacies were specific and drew attention to the direction in para. 11 of the will to "pay" the legacies given by the will out of the proceeds of her residuary estate, which was inapplicable to making provision for the legacies of the scheduled investments, if those legacies were general legacies and not specific.

Cur. adv. vult.

June 13. P. O. LAWRENCE J. This application raises the familiar question whether certain legacies of stocks and shares are general or specific.

Prima facie a legacy of stock or of shares is general notwithstanding that the testator at the date of the will possessed the precise amount of stock or the precise number of shares.

This rule, however, only furnishes a general guide to the construction of such bequests, and necessarily yields to any other indications of the testator's intention appearing from the language used in his will construed with reference to such surrounding circumstances as may legitimately be taken into account in arriving at its true meaning.

The question to be decided in the present case is whether the testatrix, when making the bequests of the investments enumerated in the second and third schedules to her will, has expressed her intention to dispose of the specific investments which she then held, or whether the testatrix, when making such bequests, has expressed her intention that the investments enumerated by her should be provided by her executors for the legatees out of her general estate. In my opinion this question is one upon which different minds may well take different views, and I confess to having felt some

(1) (1875) L. R. 20 Eq. 304.

difficulty in making up my mind as to the correct answer to it. On the whole I have come to the conclusion that the better view is that the legacies in question are specific and not general.

My reasons for arriving at this conclusion are based on the following considerations. The testatrix was a widow residing in England at the date of her will. She and her late husband formerly resided in India, but returned to England several years ago. In addition to her wearing apparel and certain articles of personal, domestic or household use and ornament and certain sums of cash at her bankers, the testatrix was at the date of her will possessed of a considerable number of investments mostly of comparatively small amount.

The investments held by the testatrix at the date of her will may conveniently be divided into two classes, namely: (1.) Indian investments and (2.) English investments. Her Indian investments consisted of Rs.35,000 secured by Indian Government 3½ per cent. Promissory Notes of 1865 and of certain shares and debentures in a number of industrial concerns in India, presumably purchased by her or her husband whilst residing in India. Her English investments consisted of 1000*l.* 5 per cent. National War Bonds and of certain debentures and shares in a number of industrial concerns mainly in England purchased, presumably, after she and her husband had returned from India.

[His Lordship then read the bequests contained in paras. 4, 6 and 7 of the will and the gift and trusts of her residuary estate contained in paras. 10, 11 and 12, and referred to the correspondence of the scheduled investments with those which the testatrix held at the time she made her will, and continued :]

In the first place it is to be observed that the testatrix in para. 4 uses the same language (mutatis mutandis) when making bequests of articles (which bequests are undoubtedly specific) as she uses when making the bequest of the stocks, shares and securities.

In the next place the testatrix in paras. 6 and 7 uses

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the definite article to indicate that the stocks, shares and securities which she bequeaths are those particularised in the schedules. The language used in these paragraphs, coupled with the lists contained in the schedules, tends, in my opinion, to show that the testatrix was referring to some existing investments, which on the evidence can readily be identified as being those then belonging to her. It is not as if the testatrix had bequeathed stocks or shares of the description mentioned in the schedule or even as if she had bequeathed the sums of stock or the number of shares mentioned in the schedule. The expression she uses is "*the* stocks shares and securities" particularised in the schedule.

In the third place, it is difficult to imagine that the testatrix ever contemplated that her trustees, both of whom are resident in England, should purchase such odd lots of shares and debentures in Indian industrial concerns as are specified in the second schedule for the benefit of English legatees, and I should require the clearest language to convince me that the testatrix had any such intention.

In the fourth place, the enumeration by way of schedule of a large number of different kinds of investments, many of which are of a small amount and of a very special character, coupled with the fact that they correspond in every particular with the investments held by the testatrix affords, in my judgment, cogent evidence that the testatrix was speaking of and intended to bequeath investments which she then held.

And lastly I think that the language used in para. 11, accords better with the hypothesis that the bequests in question are specific than with the hypothesis that they are general.

Mr. Errington's argument that, if a bequest of one sum of stock constitutes a general legacy, logically a bequest of several sums of stock constitutes several general legacies, and none the less so, because the sums of stock are set forth in a schedule instead of being inserted in the body of the will, is no doubt plausible; but I think that there may come a point when a bequest of a number of different kinds of

stocks and shares enumerated either in the body of the will or, as here, in schedules to the will, operates so as to carry conviction to the mind of the reader that the testator was describing his own investments, and I think that that point has been reached in the present case. The whole will, coupled with the admissible evidence adduced in this case, in my opinion, shows that the testatrix was parcelling out her own property, and was not, in paras. 6 and 7, giving general legacies of stocks, shares and securities which her executors would have to provide out of her general estate.

There will accordingly be a declaration that the bequests of the stocks, shares and securities contained in paras. 6 and 7 of the will are specific and not general legacies.

Solicitors: *Horace W. Davies; A. W. Osmond; Godden, Holme & Ward; Nicholson & Crouch.*

H. C. H.

In re BRITISH AMERICAN CONTINENTAL BANK, LIMITED.

GOLDZIEHER AND PENSO'S CLAIM.

[0012 of 1921.]

Company—Winding Up—Contract to deliver Foreign Currency—Breach of Contract—Damages—Rate of Exchange—Date for Conversion into English Currency.

Upon a claim in the winding up of a company (a bank) for damages for breach of contract to deliver foreign currency, the correct date when the claim ought to be converted into English currency for the purpose of ascertaining the amount for which the claimants were entitled to be admitted as creditors is the date of the breach and not the date of the winding-up order.

The principle of the decision in *Di Ferdinando* v. *Simon* [1920] 2 K. B. 704; [1920] 3 K. B. 409, is not dependent on the form of procedure and applies to a claim in a winding up.

S.S. Celia v. *S.S. Volturno* [1921] 2 A. C. 544 applied.

Decision of P. O. Lawrence J. affirmed.

SUMMONS by claimants in the winding up of the British American Continental Bank, Ld. (hereinafter called "the bank").

C. A. 1922

BRITISH AMERICAN CONTINENTAL BANK, LD., *In re.* GOLDZIEHER AND PENSO'S CLAIM.

The relevant facts, which were not in dispute, were as follows: In the month of October, 1920, Goldzieher and Penso, the applicants, who were private bankers carrying on business in Brussels, entered into business relations with the bank, and from that time forward had numerous financial transactions with the bank. The general nature of these transactions was that the applicants entered into contracts for the purchase from the bank of certain specified amounts of foreign currency (including American dollars, German marks and French francs) to be delivered by the bank to the applicants' correspondents in America and elsewhere on specified dates at an agreed price to be paid by the applicants to the bank in Belgian currency. The accounts relating to these transactions were kept as between the applicants and the bank in Belgian currency, although the bank for its own purposes also kept an account in its private ledger in English currency. The bank suspended payment on January 5, 1921, and on the following day a creditor presented a petition to the Court for the usual compulsory winding-up order.

On January 7, 1921, an order was made appointing the Official Receiver as provisional liquidator, and Mr. Kettle as special manager. The bank, previously to December 30, 1920, had entered into various contracts with the applicants of the nature already described, with eight of which contracts this application was concerned. These eight contracts may conveniently be divided into two sets. The first set consisted of three contracts for the purchase of 10,000 dollars, 1,000,000 marks, and 75,000 dollars respectively, all of which were to be delivered by the bank to the applicants or their correspondents on December 31, 1920, at prices amounting in the aggregate to 1,539,850 francs (Belgian currency), and the second set consisted of five contracts for the purchase of 1,000,000 marks, 1,000,000 marks, 250,000 marks, 750,000 francs (French currency) and 10,000 dollars respectively, all of which were to be delivered by the bank to the applicants or their correspondents on January 31, 1921, at prices amounting in the aggregate to 1,343,062 francs (Belgian

currency). On January 3, 1921, the applicants, in the belief that the bank had delivered the whole of the currency bargained for by the first set of contracts, paid to the bank the balance of the purchase money payable under the contracts comprised in this set. The bank had put its American agents in funds for the purpose of delivering the currency which it had agreed to deliver under the first set of contracts, and accepted the payment made by the applicants on January 3, 1921, in good faith. Shortly after this payment had been made the bank learnt that its American agents had failed to meet their obligations (including the delivery of the currency under the first set of contracts) and the situation was found to be so serious that the bank had no option but to suspend payment as before stated.

On January 8, 1921, Mr. Kettle wrote to the applicants informing them of the appointment of the provisional liquidator and special manager, and asking the applicants to send in an account of what was due to them by the bank at the close of the bank's business on January 5, 1921.

The applicants received this letter on January 10, 1921, and then for the first time realized that the currency under the first set of contracts had not been delivered, and that the bank was unable to deliver the currency under the second set of contracts.

The applicants thereupon, in order to put themselves in a position to fulfil their obligations to their own customers, and to minimise their loss, on January 12, 1921, purchased for the account of the bank 85,000 dollars and 1,000,000 marks to answer the currency bargained for by the first set of contracts at the price of 1,587,340 francs (Belgian currency), being the market price ruling on that day, and on January 13, 1921, purchased for the account of the bank 2,250,000 marks, 750,000 francs (French currency), and 10,000 dollars, to answer the currency bargained for by the second set of contracts, at the price of 1,376,124 francs (Belgian currency), being the market price ruling on that day.

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In the result, the applicants incurred a loss amounting in the whole to 1,619,367 francs (Belgian currency), which loss was apportionable between the two sets of contracts. The loss in respect of the first set of contracts was, of course, much larger than the loss in respect of the second set of contracts, because the applicants had already paid the purchase money payable under the first set of contracts, whereas they had not yet paid the purchase money payable under the second set of contracts, their loss under the latter, therefore, being only the difference between the contract price and the price ruling on January 13, 1921.

On January 25, 1921, the usual compulsory order was made to wind up the bank. In due course the applicants on June 23, 1921, lodged a proof in the winding up for 32,588*l.* 6*s.*, the amount claimed to be due to them on January 25, 1921, the date of the winding-up order, according to the rate of exchange then ruling.

It was admitted that under the winding-up rules the applicants had to state in their proof the amount claimed to be due to them at the date of the winding-up order; and, as the English Court did not recognize foreign currency, it was not disputed that the applicants had to state their claim against the bank in English currency. The applicants' proof for 32,588*l.* 6*s.* was made up as follows: the sum of 1,619,367 francs (Belgian currency) already mentioned, to which was added interest at 7 per cent., amounting to 6789 francs (Belgian currency), and the total sum was converted into English money at 49.50 francs (Belgian currency) per pound sterling, which was alleged by the applicants to be the rate of exchange ruling on January 25, 1921, the date of the winding-up order.

The liquidator having rejected the proof on the ground that the applicants were wrong in fixing January 25, 1921, as the date for the conversion of their claim into English currency and because they were not justified in claiming interest, this summons was taken out by the applicants for the reversal of the liquidator's decision and asking that the claim might be allowed in full at 32,588*l.* 6*s.*, being the

equivalent in sterling of 1,626,157 Belgian francs calculated at the rate of exchange prevailing on the date of the winding-up order, or that the correct date on which the rate of exchange for the debt ought to be calculated might be determined by the Court.

The claim for interest was withdrawn at the hearing. The summons came on for hearing on Feb. 16, 1922.

Clauson K.C. and *J. W. F. Beaumont* for the applicants. The correct date for conversion into English currency is the date of the winding-up order. It is not disputed that, if the claim were being enforced by means of an action in an English Court, the date for conversion would be the date of the breach of the contract. In such a case the principle would apply which was laid down in *Di Ferdinando* v. *Simon* (1); *Barry* v. *Van Den Hurk* (2); *Lebeaupin* v. *Crispin* (3); and *S.S. Celia* v. *S.S. Volturno* (4), but the principle laid down by those authorities does not apply in the case of a claim in a winding up. The effect of the winding-up order was to impress the assets of the bank with a trust in favour of its creditors. The claimants did not initiate the proceedings by bringing an action; here, it is the liquidator who, in pursuance of his statutory duty, has invited the claimants to state what the bank owes them in English money at the date of the winding-up order. Further, apart from proof in a winding up, the remedy in an ordinary case would have been by an action for an account: the proof here is in effect a claim for the balance under the contracts with the bank to be found due on taking an account. No claim could have been made against the bank before an account was rendered in the course of proving in the winding up; consequently, the proper date for fixing the rate of the exchange is the date of the winding up: *Manners* v. *Pearson & Son.* (5)

[They also referred to Form 63 of the Winding-up Rules,

(1) [1920] 2 K. B. 704; [1920] 3 K. B. 409.
(2) [1920] 2 K. B. 709.
(3) [1920] 2 K. B. 714.
(4) [1921] 2 A. C. 544.
(5) [1898] 1 Ch. 581.

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1909; see Palmer's Company Precedents, 12th ed., Part II., Winding Up, p. 260; and *Wallberg's Case.* (1)]

Schiller K.C. and *Malcolm Hilbery* for the liquidator. The correct date for ascertaining the rate of exchange is the date when the cause of action arose; that is, when the breach of contract took place, which in the case of the first set of contracts was December 31, 1920, and in the case of the second set was January 13, 1921, the date when the applicants accepted the bank's repudiation: *Di Ferdinando* v. *Simon* (2); *Barry* v. *Van Den Hurk* (3); *Lebeaupin* v. *Crispin* (4); and *S.S. Celia* v. *S.S. Volturno.* (5) When there was a balance in the hands of the bank which the bank in the ordinary course of business would place to the credit of the applicants, there arose between them the same relationship which exists between a banker and his customer who has a current account; that is to say, the relationship of debtor and creditor. The customer is entitled to demand the payment of such a balance from his banker; but to entitle him to sue for the balance, he must make a demand; that is an implied term of the contract between them: *Joachimson* v. *Swiss Bank Corporation.* (6) Formerly, the form of action for a debt or liquidated demand in money was an "indebitatus" count, and for a breach of contract sounding in damages, "indebitatus assumpsit": Bullen and Leake's Precedents of Pleadings, 3rd ed., p. 35. When the bank became insolvent, they thereby in effect repudiated the contract, and the applicants were thereupon at liberty to accept the bank's admission of their breach of the contract, treat the contract as at an end and sue the bank in respect of the breach. But the applicants did not, as they might have done, immediately accept the bank's repudiation of their liability to perform the contract and sue for damages for breach of contract; but they accepted the repudiation when they closed the account on January 13, 1921. This is a claim which does

(1) L. T. (European Arb.) 50.
(2) [1920] 2 K. B. 704; [1920] 3 K. B. 409.
(3) [1920] 2 K. B. 709.
(4) [1920] 2 K. B. 714.
(5) [1921] 2 A. C. 544.
(6) [1921] 3 K. B. 110.

not fall within s. 206 of the Companies Act, 1908, because it is one for damages which bear a certain value and do not require to be valued under that section. For purposes of proving in respect of any liability falling within s. 206, the valuation must be made as at the date of the winding-up order: *Wallberg's Case* (1); *In re Law Car and General Insurance Corporation.* (2) Proving in the winding up is mere machinery. That is the time fixed when a claimant has to say what is due to him, and for that purpose it is what was due to him at the time the breach was committed. The value of the subject matter of the contract must be ascertained in English currency as at the date when the cause of action arose; that is, at the date of the breach. This is not a case where an account is sought, as in *Manners* v. *Pearson & Son.* (3)

Cur. adv. vult.

March 15. P. O. LAWRENCE J. delivered a considered judgment in which he stated the facts as above set out and then proceeded: The question I have to determine is as to the correct date on which the applicants' claim against the bank ought to be converted into English currency for the purpose of fixing the amount for which the applicants are to be admitted as creditors in the winding up.

The liquidator contends that as the applicants' claim is one for damages for breach of contract, and as the amount of such damages was fixed once for all when the breach was committed, the correct date for the conversion of the claim from Belgian currency into English currency is the date of the breach. In support of this contention the liquidator relies upon the recent cases of *Di Ferdinando* v. *Simon* (4); *Barry* v. *Van den Hurk* (5); *Lebeaupin* v. *Crispin* (6); and *S.S. Celia* v. *S.S. Volturno.* (7)

It is not disputed that if the liquidator is right in his contention, the correct date for conversion will be, as to the loss

(1) L. T. (European Arb.) 50.
(2) [1913] 2 Ch. 103.
(3) [1898] 1 Ch. 581.
(4) [1920] 2 K. B. 704; [1920] 3 K. B. 409.
(5) [1920] 2 K. B. 709.
(6) [1920] 2 K. B. 714.
(7) [1921] 2 A. C. 544.

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suffered by reason of the breach of the first set of contracts, December 31, 1920, and as to the loss suffered by reason of the repudiation of the second set of contracts January 13, 1921 (the date when the applicants accepted the repudiation). The applicants admit that if they were seeking to enforce their claim in an action in the English Courts, the contention of the liquidator would be right, but they insist that as they are making a claim in a winding up, the above-mentioned authorities do not apply and the correct date for conversion of the claim is the date of the winding-up order.

The contention put forward by Mr. Clauson on behalf of the applicants is that the winding-up order operates to impress the assets of the bank with a trust in favour of its creditors; that the applicants, for the purpose of assisting the Court to ascertain the amounts due to those creditors, were invited by the Court to come in and state in English money what they claimed to be due to them on the date of the winding-up order; and that, therefore, the occasion for the conversion of the applicants' claim from Belgian into English currency for the first time arose when the applicants sent in their proof; with the result that the correct date for conversion is the date of the winding-up order. In my judgment this contention is not well founded.

In a winding up, this Court has to ascertain all the liabilities of the company being wound up for the purpose of effecting the proper distribution of its assets amongst its creditors. A date has necessarily to be fixed on which all debts and other liabilities are to be treated as definitely ascertained, both for the purpose of placing all creditors on an equality and for the purpose of properly conducting the winding up of the affairs of the company. According to the rules and practice now prevailing, the date so fixed is the date of the winding-up order. One effect of fixing that date is to compel those creditors whose claims do not consist of debts or of liquidated demands ascertained and payable before that date to estimate and assess the amounts which they claim to be due to them on that date. Another effect of fixing that date is that when a claim is disputed this Court will decide the

dispute as though it were being determined on the day when the winding-up order was made. Accordingly, in a case where a creditor has an unsatisfied claim against the company for damages for breach of contract, and the amount of those damages is in dispute, this Court will ascertain the correct amount as if it were sitting on the day of the winding-up order and were then trying an action for damages for the breach of that contract. In my judgment, therefore, the principle laid down in the cases cited for the ascertainment of the correct date for conversion in an action for breach of contract is applicable in the present proceedings, as that principle is in no way dependent upon the form of procedure adopted, and neither the fact that the Court has invited the applicants to state what they claim to be due to them on the date of the winding-up order, nor the fact that the order of this Court will state that the amount to which the applicants are entitled was due to them on that date, has the effect of making that date the correct date for the conversion of the damages from Belgian into English currency. The amount of damages, whenever assessed by this Court (even though for administration purposes that amount is stated to be due on some date other than the date on which this Court makes the actual assessment), must, according to the authorities cited, always be based on the loss sustained on the date of the breach of contract, and is therefore fixed once for all on that date, which date, therefore, in my judgment, is the correct date on which a claim such as the applicants' ought to be converted into English currency for the purpose of ascertaining the amount for which the applicants ought to be admitted as creditors in a winding up.

Mr. Clauson has, however, raised the further point that the applicants' claim is really a claim for an account within the meaning of the decision of the majority of the Court in *Manners* v. *Pearson & Son* (1), and that, as no statement of account was rendered until the proof was sent in on June 23, 1921, the balance due to the applicants was not

(1) [1898] 1 Ch. 581.

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ascertained before the winding-up order, with the result that the applicants' claim as on January 25, 1921, could only have been a claim for an estimated amount ascertained for the first time on that date, which date, therefore, would be the correct date for conversion.

There is, in my opinion, a conclusive answer to this point. In the first place, I am clearly of opinion that the claim of the applicants is not a claim for an account within the meaning of the decision of the majority in *Manners* v. *Pearson & Son.* (1) The applicants are not claiming to have an account taken by this Court of what is due to them under their contracts with the bank, but are claiming a sum due to them for damages for the breach by the bank of certain specified contracts. It is true that there was an account between the bank and the applicants in respect of their transactions under their contracts up to and including January 3, 1921. That account showed that there was a small balance due to the bank after debiting the account with the amount payable under the first set of contracts, and crediting the account with the amount paid by the applicants to the bank on January 3, 1921. There never was any dispute as to this account, and the applicants have never claimed and do not now claim to have this account taken by this Court. It is true that the applicants have put forward their claim for damages in the shape of an account as if the account under their contracts had continued beyond January 3, 1921, and have in that account credited themselves with the contract prices and debited the bank with the prices which they had to pay for the currency after the bank's breach and repudiation, but this fact does not, in my opinion, in any way alter the true nature of the claim or make it a claim for an account within the meaning of the decision of the majority in *Manners* v. *Pearson & Son.* (1) In the next place, even if it could properly be said that the account was one continuous account under the contracts, it is not the fact that the account was not rendered until June 23, 1921. The applicants sent in their statement of account with full particulars to the

(1) [1898] 1 Ch. 581.

provisional liquidator on January 14, 1921, and this statement was admittedly correct. Although the provisional liquidator had no power to admit the applicants as creditors for the balance shown by this account to be due to them, yet in fact a correct account was rendered to the bank on January 14, 1921, and therefore, if the claim of the applicants were one for a balance of an account, such balance became due and payable by the bank on that date. There is very little difference in the rate of exchange ruling between December 31, 1920, and January 14, 1921, so that the applicants would gain practically nothing, if the latter date were taken as the correct date for conversion; but for the reasons already stated, I am of opinion that the correct date for conversion is the date on which the breach was committed, and not the date when the account was rendered.

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In the result I hold that the applicants are wrong in their contention that January 25, 1921, ought to be fixed as the date for the conversion of their claim, and that the contention of the liquidator ought to prevail. I therefore order that the applicants be admitted as creditors for an amount to be ascertained on the footing that the correct date for conversion of so much of their claim as is based on a breach of the first set of contracts is December 31, 1920, and that the correct date for the conversion of the balance of their claim is January 13, 1921.

H. C. H.

C. A.

The applicants appealed. The appeal was heard on June 29, 1922.

Clauson K.C. and *J. W. F. Beaumont* for the appellants repeated the arguments used by them in the Court below, except that they did not now take the point depending on *Manners* v. *Pearson & Son.* (1)

Schiller K.C. and *Malcolm Hilbery* for the respondent were not called upon.

WARRINGTON L.J. This is an appeal from an order of P. O. Lawrence J. made in the winding up of the British

(1) [1898] 1 Ch. 581.

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American Continental Bank. The question raised by the appeal is as to the rate of exchange at which a liability of the company in Belgian francs ought to be converted into sterling. It is contended by the claimants that the date at which the conversion ought to take place is that of the winding-up order. It is contended by the liquidator, and that contention has been accepted by the learned judge, that the proper date to take for conversion is the date of the respective breaches of the contracts in question. The matter arises in this way: The claimants entered into certain transactions of sale and purchase with the company now being wound up. The subjects of those contracts for sale and purchase were sums of foreign currency. The contracts for the purposes of this case are divided into two groups. As to one of these groups the sums of foreign currency purchased were deliverable on December 31, 1920; as to the second group they were deliverable on January 31, 1921. With regard to the first of those groups the company committed a breach of the contract by not delivering the subjects thereof on December 31, 1920. That therefore was the date of the breach and the purchasers thereupon did what they were entitled to do, they bought their currency as against the vendor. With regard to the other group of contracts an order was made to wind up the company on January 25, 1921, that is to say before January 31, 1921, but before that date—namely, on January 13, 1921—the contracts had been repudiated, and the repudiation accepted by the purchasers. That date, therefore, is the proper date to be taken as the date of the breach in that case. The rate of exchange was different on December 31 and on January 13 to that which it was on January 25, the date of the winding up, and it is more to the advantage of the claimants, the creditors, to take the latter date as that on which conversion ought to take place. What the claimants say is this: by s. 206 of the Companies Act, 1908, it is provided that in every winding up all debts payable on a contingency, and all claims against the company present or future certain or contingent, ascertained or sounding only in damages, shall be admissible in proof as

against the company, a just estimate being made so far as possible of the value of such debts or claims as may be subject to any contingency or sounding only in damages or for some other reason do not bear a certain value. What the claimants say is that the date of the winding up is fixed as the date as on which the amount of the liabilities of the company is to be ascertained, and they say, if you ascertain the amount of the liability of the company to the present claimants as on that date, it would be so many francs or so many pounds sterling—namely, the number of pounds sterling which would have bought that number of francs on that day.

They also rely on an argument of the same nature upon the form of proof, which is as follows: That the company was at the date of the order for the winding up of the same—namely, on such and such a day—justly and truly indebted to the claimants in so many pounds, shillings and pence. But in my opinion all that these provisions, the section of the Act and the form of proof and so forth, lay down is that if you have to ascertain, and you must do it actually after the date of the winding up, when you ascertain you are treated as having dealt with the matter on the date of the winding up, but no more than that; the claim that the company was indebted to the claimants at the date of the winding up in so many francs being the amount for which they could have recovered damages in either an action for damages against the company or on their proof in the winding up if it had been disputed, but the amount of those damages would have to be ascertained by the application of the rules of law applicable to damages arising from breach of contract. That is now settled by the decision in *S.S. Celia* v. *S.S. Volturno*. (1) It is true that in that case the claim arose in tort and not in contract, but it is quite clear from the speeches delivered by the members of the House of Lords that the rule in contract and in tort is the same. That rule is that, in translating damages from foreign currency into sterling, the date at which that process has to be effected is the date of the breach of contract. The claimants' claim in the present case is for damages for breach

(1) [1921] 2 A. C. 544.

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of the two groups of contracts to which I have referred, and when it is necessary to establish what those damages are in terms of British currency the rule is, as I have already said, that they must be estimated in British currency as at the date of the breach of contract. How is it possible that there can be a different rule for proof in a winding up ? After all a creditor proves in a winding up for the debt which is lawfully due to him, and the debt which is lawfully due to him in such a case as this would be a debt in sterling at the rate of exchange at the date of the breach of contract. I can see no reason why a different rule should be applied to a proof in a winding up from that which would be applied in the case of an action resulting in a judgment. For these reasons, which are substantially those given by the learned judge, I think that this appeal fails and must be dismissed.

YOUNGER L.J. I am of the same opinion.

EVE J. And I too.

Appeal dismissed.

Solicitors for the appellants : *E. & J. Mote.*
Solicitors for the respondent : *Henry Hilbery & Son.*

G. A. S.

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P. O. LAWRENCE J.

1922

Feb. 16, 17, 28; *March* 15.

CREDIT GENERAL LIEGEOIS' CLAIM.

[1012 of 1921.]

Company—Winding Up—Proof—Breach of Contract—Bank Overdraft—Foreign Claimant—Debt due in Foreign Currency—Rate of Exchange—Date for conversion into English Currency.

Upon a claim in the winding up of a company (a bank) in England for a debt, by way of overdraft, due from the bank to the claimants (a Belgian company) in Belgium in Belgian currency, the correct date on which that debt ought to be converted into English money for the purpose of ascertaining the amount for which the claimants ought to be admitted as creditors is the date when the debt became due in Belgium.

The decision in *Scott* v. *Bevan* (1831) 2 B. & Ad. 78, and the judgment of Vaughan Williams L.J. in *Manners* v. *Pearson & Son* [1898] 1 Ch. 581, lay down the true principle for ascertaining the correct date for conversion in an action brought in England for recovery of a debt due in a foreign country in the currency of that country. The dictum of Roche J. in *Di Ferdinando* v. *Simon* [1920] 2 K. B. 704, 708, that in an action to recover a debt the rate of exchange at the time of the suit or judgment must be adopted, dissented from. The judgment of Avory J. in *Société des Hôtels du Touquet-Paris-Plage* v. *Cumming* [1921] 3 K. B. 459 approved, and the doubts expressed by Atkin L.J. in the last paragraph of his judgment in the same case on appeal [1922] 1 K. B. 451, 465 not shared.

SUMMONS by creditors in the winding up of the British American Continental Bank, Ld.

The relevant facts, which were not in dispute, were as follows: The applicants were Belgian bankers carrying on business in Brussels in the Kingdom of Belgium. The above-mentioned bank (hereinafter called "the bank") was a customer of the applicants and kept a current account at the applicants' bank in Brussels. All the operations on that current account were conducted in Belgian currency, and wherever francs are referred to in this report, they are Belgian and not French francs. On January 5, 1921, the bank suspended payment, and on the following day a creditor presented a petition to the Court for the usual compulsory winding-up order. On January 7, 1921, an order was made appointing

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the Official Receiver as provisional liquidator and Mr. Kettle as special manager. On January 8, 1921, Mr. Kettle wrote to the applicants informing them of the appointment of the provisional liquidator and special manager, and asking the applicants to send in an account of what was due to them from the bank down to the close of the bank's business on January 5, 1921. This letter was received by the applicants on January 10, 1921, and thereupon they forthwith closed their account with the bank and struck a balance. On January 14, 1921, the applicants sent to Mr. Kettle a statement of their account with the bank showing that the account was overdrawn on January 10, 1921, to the extent of 150,396 frs. The statement of account so sent was admittedly correct, and it was not disputed that the overdraft of 150,396 frs. became due to the applicants in Brussels on January 10, 1921.

On January 25, 1921, the usual compulsory order was made to wind up the bank. In due course the applicants lodged a proof in the winding up in respect of the overdraft due to them.

According to the winding-up rules the applicants' proof had to state the amount which was due to them at the date of the winding-up order. The applicants in their proof claimed that the bank was at the date of the winding-up order indebted to them "in such a sum or sums in sterling as will produce on the date or dates of payment 150,396 Belgian francs for balance of account due on the 10th January, 1921, to the Credit General Liegeois from the above named company whereof full particulars have been delivered to the above named company."

The liquidator rejected this proof on two grounds: first, because the applicants had not stated the amount due to them in English currency; and, secondly, because they had not stated the amount due to them at the date of the winding-up order. It was admitted that the applicants must state their claim in the shape of a definite sum expressed in English money and also that they must state the amount due to them on the date of the winding-up order.

This summons, accordingly, was taken out by the claimants for the reversal of the decision of the liquidator, and raising the question whether the correct date for the conversion of the debt into English money was January 25, 1921, the date of the winding-up order, or January 10, 1921, when the claimants closed the account of the bank and struck a balance, or January 5, 1921, when the bank suspended payment.

Wilfrid Hunt, for the claimants. The correct date for ascertaining the amount of the debt in English money is the date of the judgment. Assuming that this proof is to be treated as if it were an action for the recovery of a debt, the proper date is the date of the judgment; in the present case, the date of the winding-up order, which corresponds with a judgment in the case of an action. The only case reported in which the action was for a debt is *Société des Hôtels du Touquet-Paris-Plage* v. *Cumming* (1), and on appeal Atkin L.J. said that "no case that he knew of had yet decided what the position was when a foreign creditor, to whom a debt was due in his country in the currency of his country came to sue his debtor in the Courts of this country for the foreign debt." Nothing converts the debt into English money until judgment; but in the Court of Appeal the question when the rate of exchange was to be fixed was not decided. In an American case, *Marburg* v. *Marburg* (2) (referred to in the last case), which was a case of a debt, the date for fixing the rate of exchange on a conversion was decided to be the date of the judgment; and it is so stated in Westlake's Private International Law, 4th ed., p. 289, s. 226. In *Di Ferdinando* v. *Simon* (3) the date of the breach and not of the judgment was decided to be the date for fixing the rate of exchange, but the principle of that case does not apply to a debt, but only to damages: that was a case of the non-delivery of goods and the action was for damages for conversion. In the case of a debt the right to recover does

(1) [1921] 3 K. B. 459; [1922] 1 K. B. 451, 465.
(2) (1866) 26 Maryland 8.
(3) [1920] 2 K. B. 704; [1920] 3 K. B. 409.

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not crystallize until judgment. In an action for an account judgment is for the balance found on taking the account: *Manners* v. *Pearson & Son.* (1)

[He also referred to *Kirsch & Co.* v. *Allen, Harding & Co.* (2), where Roche J. held the proper date for conversion into English currency in an action for damages for breach of contract was the date of the judgment.]

Schiller K.C. and *Malcolm Hilbery* for the liquidator. The question here has to be decided on the footing that the Court was on January 25, 1921, the date of the winding-up order, hearing an action brought by the applicants to recover the debt; or, in other words, in the case of a proof in the winding up of a company, the date of the winding-up order corresponds with the date of judgment in a case where the proceedings are by action: *In re British American Continental Bank. Goldzieher and Penso's Claim.* (3) The proper date here for conversion into English currency is the date when the debt became due: *Di Ferdinando* v. *Simon* (4); *Scott* v. *Bevan.* (5) In *Manners* v. *Pearson & Son* (1) Vaughan Williams L.J., treating that action as one for the recovery of a debt or a succession of debts, expressed the opinion that the correct date for conversion into English currency in such a case was the date when the debt became due, and not the date of judgment; and he based that method of computation upon damages for breach of contract to deliver a commodity bargained for at an appointed time and place. That view of the Lord Justice was not displaced by anything that was said in *S.S. Celia* v. *S.S. Volturno* (6) or *Di Ferdinando* v. *Simon.* (4) In *Société des Hôtels du Touquet-Paris-Plage* v. *Cumming* (7), it was held by Avory J. that in an action to recover a debt the date for conversion is the date when the debt became due and not the date of the judgment.

Cur. adv. vult.

(1) [1898] 1 Ch. 581.
(2) (1919) 25 Com. Cas. 63.
(3) Ante, p. 575.
(4) [1920] 2 K. B. 704; [1920] 3 K. B. 409.
(5) 2 B. & Ad. 78.
(6) [1921] 2 A. C. 544.
(7) [1921] 3 K. B. 459; [1922] 1 K. B. 451, 465.

March 15. P. O. LAWRENCE J. delivered a considered judgment, in which he stated the facts as above set out and proceeded: In these circumstances the only question argued before me was whether the 150,396 frs. ought to be converted into English currency at the rate of exchange prevailing on January 10, 1921, the date when the account was closed, or, at the rate of exchange prevailing on January 25, 1921, the date of the winding-up order. There is a marked difference in the rate of exchange in favour of the applicants if the correct date for conversion is January 25, 1921.

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From the facts I have stated it will have been gathered that the claim of the applicants is simply one by bankers against their customer in respect of an overdraft. The relationship between banker and customer has recently been fully explained by the Court of Appeal in the case of *Joachimson* v. *Swiss Bank Corporation.* (1) Applying the principles there laid down, the claim of the applicants is for a debt which became due from the bank to the applicants in Brussels in Belgian currency on January 10, 1921. The notice received by the applicants from the special manager on this date in my opinion amounted to a direction to the applicants to close the account and operated as a waiver of any notice to which the bank might otherwise have been entitled before the applicants could properly have closed the account.

In my opinion the question which has arisen falls to be determined in the present proceedings as if this Court were sitting on January 25, 1921, and were then trying an action brought by the applicants against the bank for the recovery of their debt: see my decision in *Goldzieher & Penso's Claim.* (2) Therefore, if the correct date for conversion is the date when the debt became due in Belgium, this Court ought now to hold that the amount due from the bank to the applicants on January 25, 1921, is such a sum of English money as is equivalent to 150,396 frs. taken at the rate of exchange prevailing on January 10, 1921. If, on the other hand, the correct date for conversion is the date when for the first time

(1) [1921] 3 K. B. 110. (2) Ante, p. 575.

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it became necessary for the applicants or the Court to express the debt in English currency, then this Court ought to hold that the amount due from the bank to the applicants on January 25, 1921, is such a sum of English money as is equivalent to 150,396 frs. taken at the rate of exchange prevailing on January 25, 1921, this date, in a winding up, taking the place of the date of the judgment in an action. No later date has been suggested by counsel for the applicants.

On the assumption that my decision in *Goldzieher & Penso's Claim* (1) is right, I am of opinion that the question which I have to determine is concluded in the liquidator's favour by authorities which are binding on me. I had arrived at this opinion during the hearing of the case, and held it with some confidence, until my attention was drawn to the observations made by Atkin L.J. at the end of his judgment in *Société des Hôtels du Touquet-Paris-Plage* v. *Cumming*. (2) I confess that those observations have caused me to distrust my opinion and have raised a suspicion in my mind that there may be some fallacy underlying the conclusions which I have drawn from the authorities. Nevertheless, further reflection and a further study of those authorities have confirmed me in my opinion, the reasons for arriving at which I will now proceed to state. It is now finally settled by the decision in the House of Lords in *S.S. Celia* v. *S.S. Volturno* (3) that in an action brought in England either for breach of contract or for tort, where the damage is fixed and is due to conditions determined at a particular date, but has to be assessed in a foreign currency, the date for conversion into English money is the date when the breach or the tort was committed and not the date when the judgment of the Court is pronounced. The principle affirmed by this decision in my opinion applies to an action brought in England for the recovery of a debt payable in a foreign country in foreign currency, as the amount of the debt, for the purpose of being expressed in the judgment in English money, must be converted into English currency according to the rate of

(1) Ante, p. 575. (2) [1922] 1 K. B. 451, 465.
(3) [1921] 2 A. C. 544.

exchange prevailing between the two countries, and this mode of computation and thus converting the one currency into the other is based upon damages for the breach of contract to deliver the commodity bargained for (i.e., the foreign currency) at the appointed time and place; consequently the date for conversion is the date of breach and not the date of the judgment: see the judgment of Vaughan Williams L.J. in *Manners* v. *Pearson & Son.* (1) This view of the learned Lord Justice was based to a large extent upon the decision in *Scott* v. *Bevan* (2) which has been so fully commented upon recently in the Court of Appeal in *Di Ferdinando* v. *Simon* (3) that I need not say more about it than that there the plaintiff was seeking to recover in an English Court a judgment debt payable to him in the island of Jamaica in the currency of that island, and that it was held that the date for conversion was the date of the judgment in Jamaica.

In *Manners* v. *Pearson & Son* (1) Vaughan Williams L.J. took the view that the plaintiff was claiming to recover a debt, or rather a succession of debts, payable to him in Mexico in Mexican currency, and he expressed in the clearest possible language that in his judgment the correct date for conversion was the date when each debt became due in Mexico. It is true that the learned Lord Justice was in the minority; but the other members of the Court did not disagree with his judgment on this point, and only differed from him as to the applicability of the principle stated by him to the case before the Court, which they held to be an action for an account and not an action to recover a debt or debts which had become due before action brought. The decision in *Scott* v. *Bevan* (2) and the judgment of Vaughan Williams L.J. in *Manners* v. *Pearson & Son* (1) were held by the House of Lords in *S.S. Celia* v. *S.S. Volturno* (4) and by the Court of Appeal in *Di Ferdinando* v. *Simon* (3) to furnish an accurate guide to the principle which ought to be applied in actions for

(1) [1898] 1 Ch. 581, 592.
(2) 2 B. & Ad. 78.
(3) [1920] 2 K. B. 704; [1920] 3 K. B. 409.
(4) [1921] 2 A. C. 544.

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damages for breach of contract, and in neither tribunal was it suggested that Vaughan Williams L.J. was wrong in applying that principle to an action to recover a debt. In these circumstances I consider that I am bound to follow the judgment of the learned Lord Justice in deciding the case now before me. Here the applicants are not claiming to have an account taken by this Court of what is due to them, but are claiming in respect of a debt which admittedly became due to them before the winding-up order, therefore the actual decision in *Manners* v. *Pearson & Son* (1) has no application to the facts of this case, and I need not consider whether that decision ought to be followed, even by a Court of first instance, in view of the comments made upon it in the House of Lords in *S.S. Celia* v. *S.S. Volturno*. (2) On the other hand the judgment of Vaughan Williams L.J. seems to me to be directly in point upon the question I have to decide, and that being so (as well as for the reasons expressed by Lord Buckmaster in *S.S. Celia* v. *S.S. Volturno* (2)), I do not think that I am at liberty to follow either the American decision in *Marburg* v. *Marburg* (3) or the views expressed in Story's Conflict of Laws, 8th ed., ss. 308 to 315, and in Westlake's Private International Law, 5th ed., s. 226, p. 315. The case of *Société des Hôtels du Touquet-Paris-Plage* v. *Cumming* (4) to which I have already alluded requires further mention. In that case the plaintiffs (a foreign company) were suing for a debt payable to them in France in French currency and Avory J., applying the principles laid down in the cases I have mentioned, held that the correct date for conversion was the date when the debt became due in France. In the Court of Appeal it became unnecessary to decide this point, as it was there held that the payment by the defendants of the debt in French currency after action brought amounted to accord and satisfaction and afforded a good defence to the action. Although the Court of Appeal expressed no opinion as to the correctness or otherwise of the view taken by Avory J. on

(1) [1898] 1 Ch. 581, 592.
(2) [1921] 2 A. C. 544.
(3) 26 Maryland 8.
(4) [1921] 3 K. B. 459; [1922] 1 K. B. 451.

the point now under consideration, Atkin L.J. stated that no case that he knew of had yet decided what the position was when a foreign creditor to whom a debt was due in his country in the currency of his country came to sue his debtor in the Courts of this country for the foreign debt, and that much might be said for the proposition that the debtor's obligation was to pay, say francs, and so continued until the debt was merged in the judgment, which should give him the English equivalent at that date of those francs, and that it was a problem which seemed to require very full consideration and which he personally should desire to reserve. From these observations I gather that the learned Lord Justice is not satisfied that the authorities I have mentioned have laid down the true principles for ascertaining the correct date for conversion in actions for the recovery of debts as distinguished from actions for damages for breach of contract.

As already stated, my conclusion is that the decision in *Scott* v. *Bevan* (1) and the judgment of Vaughan Williams L.J. in *Manners* v. *Pearson & Son* (2) do lay down the true principles according to which the Court ought to ascertain the correct date for conversion in an action brought in England for the recovery of a debt due in a foreign country in the currency of that country. It is true that in the two cases I have just mentioned it is not shown that the plaintiffs were foreigners and that in *Scott* v. *Bevan* (1) the country where the debt was payable was not a foreign country, and therefore they are not precisely on all fours with the case put by Atkin L.J., but I do not for a moment think that the learned Lord Justice intended by his observations to convey that his doubts were caused by these differences, as the principle in no way depends either upon the nationality of the creditor or upon the fact that the place of payment is in the creditor's own country as distinguished from some other country, but applies, if at all, to every case where an action is brought in England for the recovery of a debt payable in some other currency than English money. Therefore the only conclusion I can draw is

(1) 2 B. & Ad. 78. (2) [1898] 1 Ch. 581.

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either that the learned Lord Justice doubted whether the decision in *Scott* v. *Bevan* (1) and the judgment of Vaughan Williams L.J. in *Manners* v. *Pearson & Son* (2) covered the case of an action for the recovery of a foreign debt, or that the learned Lord Justice disagrees with that decision and with that judgment. If the former be the true explanation of his doubts I have given my reasons for not sharing those doubts. If the latter be the true explanation I do not consider that I am at liberty, even if I should wish to do so, to depart from the principle established by those cases. In conclusion I desire to state that it follows from the opinion I have expressed in the present case that I do not agree with the dictum of Roche J. in *Di Ferdinando's Case* (3) to the effect that the rate of exchange at the time of the order or judgment is the rate to be adopted where the defendant is indebted to the plaintiff in a sum of money in foreign currency. This dictum seems to me to be in direct conflict with the judgment of Vaughan Williams L.J. in *Manners* v. *Pearson & Son* (2), which was apparently not cited to him. It also follows that I agree with the reasons given by Avory J. for his decision in *Société des Hôtels du Touquet-Paris-Plage* v. *Cumming*. (4)

In the result, I make an order that the applicants be admitted as creditors in the winding up for such a sum in English money as is equivalent to 150,396 frs. at the rate of exchange prevailing on January 10, 1921.

Solicitors : *Stephenson, Harwood & Tatham ; Henry Hilbery & Son.*

(1) 2 B. & Ad. 78.
(2) [1898] 1 Ch. 581.
(3) [1920] 2 K. B. 704.
(4) [1921] 3 K. B. 459.

H. C. H.

In re JONES AND CARTER'S ARBITRATION.

C. A. 1922 June 19, 26.

Landlord and Tenant—Agricultural Holding—Arbitration—Award—Motion to High Court to set aside—Error or Inconsistency—"Misconduct"—Exclusive Jurisdiction of County Court—Appeal—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 10, *sub-s.* 1; *s.* 24—*Agricultural Holdings Act*, 1908 (8 *Edw.* 7, *c.* 28), *s.* 13, *sub-s.* 4; *Sch. II., rr.* 11, 12, 13, 14—*Corn Production Act*, 1917 (7 & 8 *Geo.* 5, *c.* 46), *s.* 11, *sub-s.* 1—*Agriculture Act*, 1920 (10 & 11 *Geo.* 5, *c.* 76), *ss.* 10, 19, 20, *sub-s.* 2.

The inherent jurisdiction of the High Court to set aside an award under the Agricultural Holdings Act, 1908, on the ground of error appearing on the face of it where there has been no misconduct on the part of the arbitrator is not taken away by that Act. That jurisdiction was not excluded by the Arbitration Act, 1889, and when the jurisdiction under that Act with reference to arbitration proceedings under the Agricultural Holdings Act, 1908, was transferred to the county court by that Act, the inherent jurisdiction of the High Court in those matters was neither expressly nor by implication transferred to it.

APPEAL from a decision of Eve J.

In this case a motion was made on behalf of A. E. Jones the landlord in the matter of an arbitration between the landlord and J. Carter his tenant under the Agricultural Holdings Act, 1908, to set aside the award of the arbitrator on the ground that it was bad on its face by reason of error so appearing and/or inconsistency and contradiction in and between Schs. III. and IV. thereof. The tenant claimed (inter alia) for compensation for disturbance under s. 10 of the Agriculture Act, 1920, the landlord having given him notice to quit. The landlord counterclaimed for dilapidations and deterioration on the termination of the tenancy under s. 19 of that Act. Both claims having been referred to an arbitrator, he made his award, in which one of the errors alleged was that, contrary to s. 20, sub-s. 2, of the Act, he had neglected to state separately in Sch. IV. to the award the amounts awarded in respect of the several claims. In Sch. III. he awarded a year's rent to the tenant as compensation for disturbance, and in Sch. IV. a lump sum of 183*l.* to the landlord in respect of foul land and for dilapidations.

The motion was heard before Eve J. on May 19, 22, 1922. On the motion being opened a preliminary objection was

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taken on behalf of the respondent that the only Court which had jurisdiction in the matter under the Agricultural Holdings Acts was the county court.

Eve J. allowed the preliminary objection and dismissed the motion. He said that it was impossible to read s. 13, sub-ss. 1, 3, 4, of the Agricultural Holdings Act, 1908, and rr. 11, 12, 13, 14 of Sch. II. to that Act, without seeing that they raised a strong presumption that the intention of the Legislature was that these matters relating to the award should be within the jurisdiction of the county court, and not of the High Court. The question was, if that were the intention of the Legislature, ought not effect to be given to it? It was suggested that to give effect to it would create an anomalous state of things in several respects, as was pointed out by Lush and McCardie JJ. in *Murray* v. *Dalton*. (1) That was a case arising under the Corn Production Act, 1917, which provided by s. 11, sub-s. 1, that arbitrations under that part of the Act were to be held in accordance with the provisions of Sch. II. to the Agricultural Holdings Act, 1908. It was contended that s. 24 of the Arbitration Act, 1889, gave jurisdiction to the High Court. But a few days after the decision in *Murray* v. *Dalton* (1) it was enacted by the Agriculture Act, 1920, s. 5, sub-s. 2, that the Arbitration Act, 1889, should not apply to arbitrations under Part IV. of the statute of 1917. It was impossible to read the judgments in *Murray* v. *Dalton* (1) without coming to the conclusion (1.) that the mere uncertainty in the award appearing on its face could not be treated as misconduct on the part of the arbitrator, and (2.) that the jurisdiction of the High Court was intended to be excluded. Once that intention was clearly demonstrated that these matters should be left to the jurisdiction of the county court he was constrained to hold that the jurisdiction of the High Court, inherent or otherwise, was ousted.

The respondent appealed. The appeal was heard on June 19, 26, 1922.

(1) (1920) 90 L. J. (K. B.) 401.

Foà for the appellant. It is submitted that Eve J. was wrong in holding that the Agricultural Holdings Act, 1908, took away the inherent jurisdiction of the High Court to set aside an award on the ground of error appearing on its face. If the Court holds that what the arbitrator has done amounts to legal misconduct then it must be admitted that the county court judge alone would have jurisdiction under the Act to deal with the matter. The learned judge has held that even if what he has done does not amount to legal misconduct the appellant could not apply to the High Court but must go to the county court.

Assuming, however, that this is not a case of misconduct on the part of the arbitrator, it is submitted that there is inherent jurisdiction in the High Court to set aside all awards containing manifest error in the absence of statutory ruling taking away that jurisdiction: *Murray* v. *Dalton*. (1) There has here been a mistake of law which does not amount to misconduct: *Darlington Wagon and Engineering Co.* v. *Harding* (2); *In re O'Conor and Whitlaw's Arbitration*. (3) The inherent jurisdiction of the High Court in these matters has not been transferred to the county court by the Act of 1908. That Act, by s. 13, sub-s. 3, provides that a case may be stated by the arbitrator for the opinion of the county court on any question of law and gives a right of appeal to either party to the Court of Appeal from the decision of the county court. By r. 13 of Sch. II. to the Act: "When an arbitrator has misconducted himself, or an arbitration or award has been improperly procured, the county court judge may set the award aside." Those provisions lay down a course of procedure which the landlord or the tenant may adopt, but they do not either expressly or by necessary implication take away from the High Court its inherent jurisdiction to set aside an award for error appearing on the face of it. Where, as here, the language of a statute is plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it

(1) 90 L. J. (K. B.) 401; [1920] W. N. 398.

(2) (1890) 7 Times L. R. 106.

(3) (1919) 88 L. J. (K. B.) 1242.

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has in clear terms enacted must be enforced though it should lead to absurd or mischievous results: *Vacher & Sons* v. *London Society of Compositors* (1); *Inland Revenue Commissioners* v. *Herbert* (2); *In re Boaler* (3); *City of London Corporation* v. *Associated Newspapers.* (4) The jurisdiction of the county court to set aside an award on the ground of error appearing on its face is a casus omissus from the Act of 1908 and cannot be supplied by the Court, for to do so would be to legislate: *Jones* v. *Smart* (5); *M'Cowan* v. *Baine* (6); *Salomon* v. *Salomon & Co.* (7); *North Eastern Ry. Co.* v. *Leadgate Local Board.* (8)

Farwell for the respondent. This appeal raises two questions: (1.) whether upon the construction of the Act of 1908 the inherent jurisdiction of the High Court to set aside an award on the ground of error appearing on its face has been transferred by that Act to the county court, and (2.) whether in this case there has been misconduct on the part of the arbitrator.

1. It is submitted that it was the intention of the Legislature by the Act of 1908 and Sch. II. thereto to constitute a complete code which should confine all matters arising under the Act to the county court. Rule 6 of the schedule empowers the county court to remove an arbitrator who has misconducted himself and r. 11 provides that an award shall be binding on the parties and the persons claiming under them respectively. It is true that no provision is made by the Act or the schedule for setting aside an award for error appearing on its face, but power is given to the arbitrator by r. 12 to correct in an award any clerical mistake or error arising from any accidental slip or omission. It is admitted that unless the inherent jurisdiction is excluded by the Act of 1908 it still remains in the High Court and that there is no remedy in the county court. The result of this might be that an applicant might have to go to two Courts—the High Court and the

(1) [1913] A. C. 107, 113, 121, 130.
(2) [1913] A. C. 326, 332.
(3) [1915] 1 K. B. 21, 31.
(4) [1915] A. C. 674, 693.
(5) (1785) 1 T. R. 44.
(6) [1891] A. C. 401, 409.
(7) [1897] A. C. 22, 38.
(8) (1870) L. R. 5 Q. B. 157.

county court. The intention of the Act was to restrict the number of appeals and to give the county court exclusive jurisdiction to deal with awards in respect of all matters arising under the Act. It is submitted therefore that the Act does impliedly take away the inherent jurisdiction of the High Court.

2. It is said that the award is bad, because it does not show the sum awarded was divided up. That, it is submitted, is clearly misconduct on the part of the arbitrator and not a case of error appearing on the face of the award. The misconduct consists in the arbitrator disregarding the rules laid down by s. 20, sub-s. 2, of the Act. The expression "misconduct" does not necessarily involve personal turpitude on the part of the arbitrator. The term does not really amount to more than such a mishandling on the part of the arbitration as is likely to amount to some substantial miscarriage of justice: Per Atkin J. in *Williams* v. *Wallis and Cox.* (1)

LORD STERNDALE M.R. This case raises a somewhat important question—namely, whether the inherent jurisdiction of the High Court to set aside an award on the ground of error appearing on the face of it is taken away by the Agricultural Holdings Act, 1908. It is admitted that the power to set aside an award on that ground, whether in an arbitration under that Act or in an arbitration under the Arbitration Act, 1889, exists only by virtue of the inherent jurisdiction of the Court, and is not conferred by either of those Acts, and that if it be not taken away, that jurisdiction exists and can be exercised.

Sect. 13, sub-s. 1, of the Agricultural Holdings Act, 1908, provides for the reference of all questions arising under a contract of tenancy to a single arbitrator in accordance with the provisions set out in Sch. II. to the Act. By r. 6 of that schedule "Where an arbitrator has misconducted himself the County Court may remove him." By r. 9 "The arbitrator may at any stage of the proceedings, and shall if so directed

(1) [1914] 2 K. B. 478, 485.

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by the judge of the County Court (which direction may be given on the application of either party), state in the form of a special case for the opinion of that Court any question of law arising in the course of the arbitration." If such a case be stated, then under s. 13, sub-s. 3, of the Act, the opinion of the Court on any question so stated is to be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals —not to the Divisional Court, which is the ordinary tribunal of appeal from the county court, but to this Court. By r. 11 of the schedule the award to be made by the arbitrator is to be final and binding on the parties and persons claiming under them respectively, and by r. 12 the arbitrator is empowered to correct in an award any clerical mistake or error arising from an accidental slip or omission. Rule 13 provides: "When an arbitrator has misconducted himself, or an arbitration or award has been improperly procured, the County Court may set the award aside." Those provisions give the same powers as to dealing with an award as are given by the Arbitration Act, 1889, with this exception, that the case is stated for the opinion of the county court, not of the High Court, and the county court is the Court which has to deal with the arbitrator for misconduct, either by removing him or by setting aside his award. Therefore for the matter with which I am now dealing, the powers of dealing with an award given by the Agricultural Holding Acts are in substance the same as those given by the Arbitration Act, and, with respect to the learned judge who decided this case in the Court below and to the Divisional Court who decided another case upon the same lines (1), I do not think that the inclusion or exclusion of the Arbitration Act from either the Agricultural Holdings Act or the Corn Production Act, 1917, is a matter which determines the question one way or another. But this, I think, is quite clear, that the provisions of the Arbitration Act do not exclude the inherent jurisdiction of the Court. In cases under that Act the Court which deals with the award under its inherent jurisdiction and the Court

(1) *Murray* v. *Dalton*, 90 L. J. (K. B.) 401.

which deals with it under the express provisions of the Act is the same, and therefore no difficulty arises as to the jurisdiction under which it is acting. But the case is different where the question arises under an Act by which express powers are given to the county court. I have not much doubt myself that it was intended by the Act of 1908 to lay down, as was contended by Mr. Farwell in his admirable argument, a complete code, and one which confined the jurisdiction in these matters to the county court. But the question we have to determine is whether that intention has been carried out. In my opinion it has not. As the express provisions of the Arbitration Act do not exclude the inherent jurisdiction of the High Court, so, in my judgment, the express provisions of the Agricultural Holdings Act, 1908, which are in substance the same, do not do so either. I am quite aware that this decision may in certain cases give rise to hopeless confusion; but I agree with Mr. Farwell that I am not entitled to take that into consideration. I am inclined to think that a decision the other way would give rise perhaps to not quite such hopeless confusion, but to a good deal of confusion also. The fact is that the Legislature in framing this Act has unfortunately failed to see the difficulty which arises when part of the jurisdiction is given to one Court and the jurisdiction existing in another Court is not taken away. I am sorry to say therefore that I cannot agree with the decision of the learned judge that the inherent jurisdiction of this Court is excluded. I think therefore the preliminary point fails upon that ground, and the learned judge's decision was erroneous. The result I am afraid is that the matter must go back to be dealt with by the learned judge.

I wish however to say this: I quite agree that an error on the face of an award does not necessarily arise from misconduct on the part of the arbitrator. But I think that an error that appears on the face of the award may arise from misconduct, by which I mean, of course, technical or legal misconduct, and not moral misconduct, and if it does so arise then it is admitted that under r. 13 of Sch. II. the county court, and the county court alone, is the Court which

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must deal with it. To that extent, in my opinion, the jurisdiction would be taken away, in this sense, that if the objection is an objection supported by something which amounts to misconduct, then it must be dealt with by the county court, and not the High Court, and that it does not matter that it is misconduct which is established by something appearing on the face of the award. That will be a matter to be dealt with in the Court below. I do not think it is necessary to say anything at all as to any opinion I may have formed upon the question which is not now before us—namely, the validity of the objection to this award on the ground of what appears on the face of it. But it must always be remembered, and I am quite sure that the learned judge before whom the case may go will remember it, that error on the face of the award is a very narrow ground indeed, and the jurisdiction has to be administered with great care in order that extraneous considerations not appearing on the face of the award are not introduced into the matter. I think the appellant is entitled to the costs of the appeal; the rest of the costs must be dealt with by the learned judge who hears the case.

WARRINGTON L.J. This is an application for the exercise by the Court of its inherent jurisdiction to set aside an award for error of law appearing on its face. That such jurisdiction is inherent in the Court and is exercisable by it unless taken away by statute is admitted, but it is contended that the Agricultural Holdings Act of 1908 has taken away the jurisdiction, not by express terms but by necessary implication, and this view was taken by the learned judge in the Court below. In my judgment that view was erroneous. The question turns on the construction of the Agricultural Holdings Act, 1908, s. 13, and Sch. II. I do not propose to read either of them again. What appears from the section is that the provisions as to arbitration of that Act of 1908, were, for the purpose of these particular arbitrations, substituted for the provisions of the Arbitration Act, 1889. It is mainly on Sch. II. that Mr. Farwell has based his argument, which is in effect that Sch. II. provides a complete code

for the regulation of these particular arbitrations, and that no considerations outside that Act can be introduced. With reference to that, my opinion is founded on this. The provisions of the Act now in question with regard to the powers of the county court, substituted by this Act for the High Court, to set aside an award are the same as those conferred by the Arbitration Act upon the High Court. Under the Arbitration Act it is admitted that the inherent jurisdiction now in question was not excluded, and, that being so, I fail to see how it can be excluded by substantially identical provisions contained in the Agricultural Holdings Act of 1908.

I desire here to add, on my own account, the caution which the Master of the Rolls has expressed, that although the jurisdiction exists it must be borne in mind that it is a very limited jurisdiction. It is to set aside for error appearing on the face of the award, and it may well be that in particular cases the error, such as it is, may be in the nature of misconduct, and if that be so, then the jurisdiction of the High Court would be excluded, and the only Court which would be able to deal with the matter would be the county court, the tribunal provided by the Agricultural Holdings Act. I agree that the matter should be remitted to the judge below to deal with it on its merits.

YOUNGER L.J. I am of the same opinion. Neither in the Act of 1908 nor in Sch. II. to that Act is there any reference express or implied to any inherent jurisdiction in any Court with reference to the arbitrations that are thereby directed. Now the only Court which has inherent jurisdiction in matters of awards is the High Court. The county court has no such inherent jurisdiction. Under the Act of 1908, however, it is the county court, and not the High Court, which is given express jurisdiction with regard to the awards of an arbitrator in references under that Act. Now there is in that Act no mention of any inherent jurisdiction remaining in any Court. On that Mr. Farwell for the respondent suggests that the omission of all reference to the question of inherent jurisdiction,

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especially when regard is had to the fact that the only Court which is given express powers with reference to awards is a Court which has no such inherent jurisdiction, justifies the conclusion that the Legislature in this statute intended, and has with sufficient clearness expressed the intention, that in relation to awards under it, the express terms of the statute shall in this matter be treated as a complete whole to which no addition is to be made by reference to any inherent jurisdiction in any Court whatever. It cannot be supposed, he says, that the Legislature intended to make applicable some inherent jurisdiction in a Court other than the Court to which, under the terms of the Act, all matters relating to these arbitrations are referred. Now I am very conscious of the force of that argument but, like my Lord and the Lord Justice, I do not see my way to accede to it. Speculation, if to any extent it be permissible, would I think find the explanation of the omission of all reference in this Act of 1908 to inherent jurisdiction in a direction other than that suggested by Mr. Farwell. Sch. II. of the Act, as is agreed on both sides, is substantially the same (I use the word "substantially" advisably, because there are some differences which are for this purpose immaterial) as the Arbitration Act of 1889. Now the reason why in relation to references dealt with by the Arbitration Act there is no reference to inherent jurisdiction in the Court is, I should think, quite plainly this, that the Court possessing that inherent jurisdiction is the Court to which by that Act all questions with reference to these arbitrations are referred. My conjecture or speculation accordingly is that the framers of this schedule to the Act of 1908 for the moment forgot that in the county court to which the matters arising in these statutory arbitrations are by the schedule referred, there is no inherent jurisdiction at all with reference to awards. This forgetfulness rather than any intention to exclude altogether recourse to inherent jurisdiction in any Court, a jurisdiction which with reference to arbitrations under the Arbitration Act is preserved for the purpose of enabling justice to be done in many serious cases not provided for in express terms by that statute is, in my

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judgment, a sufficient explanation of the omission now under consideration. Accordingly I agree with my Lord and the Lord Justice in thinking that the inherent jurisdiction of the High Court to set aside an award under this Act of 1908 for error appearing on the face of it is not taken away by that Act with reference to arbitrations under it. Unfortunate it is, I agree, that the exercise of that jurisdiction is in a Court different from that in which by the Act all other questions in relation to these arbitrations are referred.

Appeal allowed.

Solicitor for applicant: *C. E. Pullon, for Pearsons & Jones, New Malton, Yorks.*

Solicitors for respondent: *Gane & Son, for J. W. Heddon, Ripon.*

W. I. C.

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[1920. C. 4268.]

Local Government—Privies and Water-closets—Local Authority—Powers—Substitution of Water-closet for Privy—Scheme for conversion into Water-closets—Notices—Validity—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 36—*Public Health Acts Amendment Act*, 1907 (7 *Edw.* 7, *c.* 53), *s.* 39.

By s. 36 of the Public Health Act, 1875, if a house within the district of a local authority appears to such authority, by the report of their inspector of nuisances, "to be without a sufficient water-closet earth-closet or privy and an ashpit furnished with proper doors and coverings," the local authority are directed to give notice to the owner or occupier of the house requiring him "to provide a sufficient water-closet earth-closet or privy and an ashpit furnished as aforesaid, or either of them, as the case may require":—

Held, that a local authority had power under this section, upon being satisfied that a house within their district was without a sufficient privy, to require the owner (subject to his right to appeal to the Local Government Board, now the Ministry of Health, under s. 268) to provide a sufficient water-closet in the place of the existing privy.

Nicholl v. *Epping Urban Council* [1899] 1 Ch. 844 approved and followed.

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Dictum of Lord Halsbury in *Wood* v. *Widnes Corporation* [1898] 1 Q. B. 463, 466 explained.

Dictum of Lord Alverstone in *Smith* v. *Greenwood* [1907] 2 K. B. 385, 389 overruled.

Held, also, that the power given by s. 36 was not limited or restricted by s. 39 of the Public Health Acts Amendment Act, 1907. The two sections dealt with different matters, s. 36 with the sufficiency of the particular convenience and s. 49 with the sufficiency of the closet accommodation in the particular house.

Per Sterndale M.R. A local authority have power under s. 36 of the Act of 1875 to deal with the question of an ashpit altogether apart from its connection with a privy.

The inspector of nuisances for the rural sanitary authority of H. in answer to complaints inspected the privies attached to four miners' dwelling houses, belonging (with many others) to a colliery company, and reported to the authority that he found liquid soaking through the walls of the privies and oozing up through the ground in the back yards of those houses, that the privies were insufficient within the meaning of s. 36 of the Public Health Act, 1875, and recommended that notices should be served on the company to provide a sufficient water-closet to each of the houses. In consequence of that report, on September 7, 1920, the authority caused the notices, so recommended, to be served on the company. In December, 1918, the authority or their predecessors had passed resolutions adopting suggestions of the Sanitary Committee that every case of a defective privy reported by the inspector should be separately considered on its merits, and if the Sanitary Committee were satisfied that it was defective notice should be served requiring the owner to convert the privy into a water-closet under s. 36, and that cases of insufficiency in point of number should be dealt with under s. 39 of the Public Health Acts Amendment Act, 1907. In an action by the colliery company against the local authority claiming a declaration that the notices were ultra vires, and for an injunction, the Court was satisfied by the evidence that the report of the inspector was in accordance with the facts and honestly made by him in the proper discharge of his duties; that he was not induced or inspired by the authority to make the report for the purpose of bringing about a general conversion of the privies in question into water-closets in furtherance of the resolution of the authority, but that he honestly believed that they were insufficient within s. 36; that the authority bona fide came to the conclusion, after considering the circumstances of each case, that the houses were without sufficient accommodation within the meaning of s. 36; that the proper remedy in each of the cases was the substitution of a water-closet for the existing privy; and that the authority did not attempt to embody in the scheme a provision to misuse the powers conferred by s. 36:—

P. O. Lawrence J. held that the resolution passed by the authority was intra vires and unobjectionable; that the notices were not served in pursuance of a scheme; that the mere fact, as the evidence showed, that the majority of the members of the authority were individually predisposed in favour of water-closet accommodation did not disqualify the authority as a body from exercising, and that they did in fact

exercise, a proper discretion in the particular cases in question, and consequently that the notices were valid. On appeal:—

Held, that there was evidence on which the findings of the learned judge could be supported and that the appeal failed.

Decision of P. O. Lawrence J. [1922] 1 Ch. 521 affirmed.

APPEAL by the plaintiffs from the decision of P. O. Lawrence J. (1)

The facts are fully stated in the report of the case in the Court below and may be sufficiently gathered from the above headnote.

The appeal was heard on June 19, 20, 21, 1922.

Maugham K.C. and *Scholefield K.C.* for the appellants. The respondents in giving the notices in question have exceeded their powers. They had no power under s. 36 of the Act of 1875 (2) to require the appellants to substitute water-closets for their existing privies notwithstanding that they were satisfied that the privies were for the time being insufficient. Under s. 35 of the Act (2) the owner of a newly

(1) [1922] 1 Ch. 521.

(2) Public Health Act, 1875, s. 35: "It shall not be lawful newly to erect any house, or to rebuild any house pulled down to or below the ground floor, without a sufficient water-closet earth-closet or privy and an ashpit furnished with proper doors and coverings. . . . ."

Sect. 36: "If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet earth-closet or privy and an ashpit furnished with proper doors and coverings, the local authority shall, by written notice, require the owner or occupier of the house, within a reasonable time therein specified, to provide a sufficient water-closet earth-closet or privy and an ashpit furnished as aforesaid, or either of them, as the case may require.

"If such notice is not complied with, the local authority may, at the expiration of the time specified in the notice, do the work thereby required to be done, and may recover in a summary manner from the owner the expenses incurred by them in so doing or may by order declare the same to be private improvement expenses . . . ."

Sect. 41: "On the written application of any person to a local authority, stating that any drain water-closet earth-closet privy ashpit or cesspool on or belonging to any premises within their district is a nuisance or injurious to health (but not otherwise), the local authority may . . . . enter such premises . . . . and cause the ground to be opened, and examine such drain water-closet earth-closet privy ashpit or cesspool. . . . . If the drain water-closet earth-closet privy or cesspool on examination shall appear to be

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erected house has an option to provide closet accommodation of one of three kinds, a water-closet, an earth-closet or a privy. Sect. 36 deals with the case of old houses, and it cannot, it is submitted, have been intended by that section that an owner who under s. 35 had an option when he was building his house should be deprived of that option in the case of an old house and where the water-closet, earth-closet or privy were not sufficient. The local authority cannot, it is submitted, under s. 36 dictate to the owner which of the three kinds of closet accommodation he shall provide. They have no power under that section to order water-closets to be substituted for privies. The owner is entitled to have an opportunity given him of putting his existing privy into a proper state of repair. Whatever view might have been taken of the Act of 1875 when it stood alone, a great deal of light has been thrown on its construction by the Act of 1907

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in a bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice . . . . to be given to the owner or occupier requiring him . . . . to do the necessary works; and if such notice is not complied with . . . . the local authority may . . . . execute such works and may recover in a summary manner from the owner the expenses. . . . ."

Public Health Acts Amendment Act, 1907, s. 39, sub-s. 3: "If, on the report of the medical officer or the surveyor or the inspector of nuisances, the local authority are satisfied that sufficient closet accommodation has not been provided at or in connection with a building, and the case is not one in which sufficient closet accommodation can be provided by the alteration of any existing closet accommodation in pursuance of this section, the local authority, where there are a sufficient water supply and sewer, may by written notice to the owner or owners of the building require the building to be provided with such number of proper and sufficient water-closets and slop-closets, or with such one or more of either class of closet, as the circumstances of the case may render necessary. . . . ."

Sub-s. 4: "The local authority, where there are a sufficient water supply and sewer, may by written notice to the owner or owners of a building require any existing closet accommodation (other than a water-closet or a slop-closet) provided at or in connection with the building to be altered, so as to be converted into a water-closet or slop-closet." [Then follow provisions enabling the local authority to do the work required if the owner fail to comply with the requirement and providing that in a case where the local authority does the work in respect of any existing closet accommodation one-half of the expenses should be borne by the local authority and the remainder of the expenses by the owner.]

which is to be read with it. The Court is now in a better position to determine the point than Stirling J. was in *Nicholl* v. *Epping Urban Council.* (1) He was there only construing one Act. Here the Court has to construe a composite Act. It is submitted that the words " without a sufficient water-closet " etc. in s. 35 have the same meaning as in s. 36 of the Act of 1875 and the same meaning in s. 39 of the Act of 1907. Sects. 35 and 36 are dealing with the case where there is no closet at all. If there is an existing privy which can be repaired the local authority have no power to order a water-closet to be substituted for it. The owner satisfies s. 35 if he provides a sufficient water-closet, earth-closet or privy at his option and in any case he must provide an ashpit. Sect. 36 must be read with s. 35. The former section allows an interference with private property and therefore prima facie a limited construction must be given to it. If a section is fairly open to two constructions an owner must be given the benefit of the more restricted construction. In s. 39, sub-s. 3, of the Act of 1907 the words " closet accommodation " mean the three classes of convenience mentioned in ss. 35 and 36 of the Act of 1875.

[YOUNGER L.J. The option given by s. 35 is now gone.]

It is submitted that since the Act of 1907 the local authority have no power to require the substitution of a new water-closet except in a case where the alteration of any existing closet accommodation cannot be carried out. In *Smith* v. *Greenwood* (2) Lord Alverstone C.J. in pointing out the distinction between the section of a local Act then before the Court and s. 36 of the Act of 1875 said: " The distinction between the section before us and s. 36 of the Public Health Act, 1875, is that under the latter all that the local authority can require is that the particular convenience provided by the owner shall be sufficient, but, subject to the requirement that it must be sufficient, it is left to the owner to select which of the several kinds of convenience, privies, water-closets, or earth-closets, he will adopt." See

(1) [1899] 1 Ch. 844. (2) [1907] 2 K. B. 385, 389.

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also per Lord Halsbury in *Wood* v. *Widnes Corporation* (1); *Agnew* v. *Manchester Corporation.* (2)

Further, the notice in question was not given bona fide. It was given in pursuance of a resolution of the local authority by which they had determined that they would put in force a general scheme for the conversion of privies into water-closets throughout their district.

In *Tinkler* v. *Wandsworth Board of Works* (3) it was held that a metropolitan district board of works had no authority under s. 81 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), which is in pari materia with s. 36 of the Act of 1875, to lay down any general rule requiring owners or occupiers of houses situate within their district to convert privies into water-closets. In *Wood* v. *Widnes Corporation* (4) it was held that s. 36 did not empower a local authority to enforce a general resolution that in all cases within their jurisdiction a particular system should be adopted; but that they were bound to exercise their discretion in each particular case, and consequently that a notice in accordance with the general resolution and requiring compliance with its provisions was invalid.

[LORD STERNDALE M.R. The learned judge has found that what the local authority here did was done by them bona fide after investigation. You have to displace that finding.]

It is submitted that the proper inference from the evidence is that the local authority had, by their resolution of December, 1918, precluded themselves from exercising their discretion. The vice of that resolution consisted in its tying the hands of the Council by pledging it to substitute a water-closet in every case in which a defective privy was reported. After the resolution was passed no action was ever taken under the nuisance sections of the Act of 1875. There were many reports subsequently made by their inspector of nuisances of defective privies, and in all of those cases orders were made for the conversion of the privies into water-closets. The resolution is also open to the objection that a privy though

(1) [1898] 1 Q. B. 463, 466.
(2) (1902) 67 J. P. 174.
(3) (1858) 2 De G. & J. 261.
(4) [1898] 1 Q. B. 463.

defective may still be an effective privy. Sect. 36 requires the Council to consider the sufficiency of a privy as a privy. The Council were influenced in coming to their decision by considerations of cost which were irrelevant. It is submitted that the resolution of December, 1918, and the course of conduct of the Council for the two years following it are evidence of a scheme.

[They also referred to *Reg.* v. *Local Government Board* (1); *Rex* v. *Local Government Board* (2); *St. Luke's Vestry* v. *Lewis* (3); Public Health Act, 1875, ss. 37, 40–44, 81, 91–96; Public Health Acts Amendment Act, 1907, ss. 11, 39, sub-s. 2.]

Jenkins K.C. and *Naldrett* for the respondents were called upon only as to the construction of s. 36. It is contended by the appellants that the local authority were bound to give the owner the choice of the convenience he would adopt. It is contrary to the principles of construction to construe s. 36 by a later Act. Before the Act of 1875 was passed Knight Bruce L.J. in *Tinkler* v. *Wandsworth Board of Works* (4) which was decided under a very similar provision in the Metropolis Management Act, 1855, expressed a strong opinion against the claim of a local authority to substitute water-closets for privies, asking an undue interference with the rights of property. But in the subsequent case of *St. Luke's Vestry* v. *Lewis* (3) the precise point arose for decision of the Court of Queen's Bench and they decided against the dictum of Knight Bruce L.J. It must be presumed that the draftsman had that decision before him when he drafted the Act of 1875. The point was not raised again till 1889 when it was raised before Stirling J. in *Nicholl* v. *Epping Urban Council* (5) who there held that it was covered by *St. Luke's Vestry* v. *Lewis*. (3) That decision was a clean decision in the respondents' favour on the precise point and has been acted upon ever since. It can hardly be conceived that the framers of the Act of 1907 who desired to give larger powers to local authorities would have restricted their powers

(1) (1882) 10 Q. B. D. 309.
(2) (1914) 79 J. P. 248.
(3) (1862) 1 B. & S. 865.
(4) 2 De G. & J. 261.
(5) [1899] 1 Ch. 844.

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in the way suggested by the appellants. In *Wood* v. *Widnes Corporation* (1) it was conceded that the notice in that case was given in pursuance of a general resolution. It is submitted that the appellants are wrong in claiming that Lord Halsbury in that case expressed an opinion in their favour. It is admitted that the dictum of Lord Alverstone in *Smith* v. *Greenwood* (2) is against the respondents' contention. But it is submitted that that dictum was per incuriam, and, having regard to the other cases, should be disregarded. It is true that under s. 35 the builder of a house had a choice of what kind of convenience he would adopt. But the respondents rely upon the express words of s. 36. Under that section it is for the authority to decide, subject to an appeal to the Local Government Board, now the Ministry of Health, what kind of convenience they will require, and so to decide having regard to what they consider the particular case requires. The language of the section is, it is submitted, sufficiently clear.

Then as to the argument on the Act of 1907, it is submitted that the framers of that Act were not intending to interfere with s. 36. The true view is that the words "sufficient closet accommodation" in s. 39, sub-s. 3, have a different meaning from what they have in s. 36. The Legislature by the Act of 1907 intended to give local authorities power to frame schemes for the conversion of privies into water-closets, but on the terms that they should pay half the cost. If the convenience is sufficient and the local authority desire to substitute a water-closet they must pay half the cost. Sect. 35 applies to a new house and the builder could supply what kind of convenience he liked. Sect. 36 deals with a different state of things because there the owner is in default.

Maugham K.C. in reply. Under s. 36 as under s. 35 there may be no default at all. Why then should the owner be given an option in one case and not in the other? The Act of 1907 is by s. 2 declared to be construed as one with the earlier Acts. Sect. 36 at the best only ambiguously expressed the intention of the Legislature which is cleared up by the later

(1) [1898] 1 Q. B. 463. (2) [1907] 2 K. B. 385, 389.

Act. The Act of 1875 gave the owner an option as regards the kind of convenience he would provide both in the case of old and new buildings provided he complied with the section. That option is taken away by the Act of 1907. The order in the present case should have been made under s. 39, sub-s. 4, of the Act of 1907.

LORD STERNDALE M.R. This is an appeal from a decision of P. O. Lawrence J. which raises an important question under the Public Health Acts of 1875 and 1907. It raises one point of general importance on the construction of the Acts, and another point of importance to the parties which is purely a question of fact. I propose to deal with the point of general importance first.

The appellants here are the owners of certain houses, a good many of which are within the district of the respondents who are a rural district council. These houses are nearly all provided with privies and not with water-closets. In July of 1920 notices were served upon the owners with regard to four houses, two in Queen Street, South Elmsall, within the rural district of Hemsworth, and two in King Street, South Elmsall, also within the same district. The notices were all in the same form. One of the notices was as follows: "Local Government Act, 1894. Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 36). To F. J. Holdsworth, Secretary to the Carlton Main Colliery Company, Colliery Offices, Grimthorpe, the owners of 38 King Street South Elmsall in the rural district of Hemsworth. Take notice that the Rural District Council of Hemsworth in the county of Yorks, being satisfied on the report of their inspector of nuisances dated the 22nd day of July, 1920, that the house above described is without a sufficient water-closet, earth-closet, or privy and an ashpit furnished with proper doors and coverings, hereby require you in pursuance of the provisions of the Public Health Act 1875 to provide for the said house within the space of twenty-eight days from the service upon you of this notice a sufficient water-closet and an ashpit furnished with proper doors and coverings (a sanitary dustbin may be

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provided in place of ashpit). If the above notice is not complied with within the time aforesaid the Rural District Council of Hemsworth, may at the expiration of such time, do the work required to be done, and recover the expenses incurred in so doing in the manner provided by the said Act." The first objection, which goes to the root of the whole matter, is that it is entirely beyond the power of the local authority under s. 36 of the Public Health Act, 1875, to require that a house which is at present furnished with an insufficient privy shall be furnished with a water-closet, a different kind of sanitary convenience, and that, although circumstances may exist which make it necessary as a practical matter that a water-closet should be supplied, there is no power under the section for the local authority to require that it should be supplied until the owner has had an opportunity of trying his own hand at converting or repairing his privy and making it sufficient. That is to say, that the local authority exceeded their authority in issuing a notice requiring the conversion of a privy into a water-closet, although the privy might in fact be entirely insanitary and no repairs could make it properly sanitary and sufficient, and although it was a fact that the only possible practical way of ensuring the provision of a sufficient sanitary convenience—to use a general expression—was to have a water-closet. That is the broad point lying at the root of the whole matter, and if the appellants' contention is right then of course the learned judge's judgment was wrong, the local authority were wrong and the appeal ought to succeed.

The question depends upon certain sections of the Public Health Acts, 1875 and 1907. Sects. 35 and 36 of the Public Health Act, 1875, seem to me to be in substance the same as the two parts of s. 51 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 35 corresponding to the first part of that section, dealing with new houses, and s. 36 corresponding to the second part of that section dealing with all houses, whether new or old. In the second part of s. 51 of the Act of 1848 these words were used: "If at any time, upon the report of the surveyor, it appear to the Local Board of

Health that any house, whether built before or after the time when this Act is applied to the district"—those words "whether built before or after," and so on, are not in s. 36. In my opinion s. 36 is speaking of a house without any qualification, and is dealing with exactly the same thing as if the words "whether built before or after the coming into operation of this Act" had been inserted. Now s. 35 provides: "It shall not be lawful newly to erect any house, or to rebuild any house pulled down to or below the ground floor, without a sufficient water-closet earth-closet or privy and an ashpit furnished with proper doors and coverings." The earth-closet did not appear in the Act of 1848. "Any person who causes any house to be erected or rebuilt in contravention of this enactment shall be liable to a penalty not exceeding twenty pounds."

It is said, and I accept it, that in a case under s. 35 a man who builds a house is given an option as to what kind of sanitary convenience he will provide, and that if he provides a sufficient one of any kind no more can be said to him. I will assume that is so. Sect. 36 is in these terms: "If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet earth-closet or privy and an ashpit furnished with proper doors and coverings, the local authority shall, by written notice, require the owner or occupier of the house, within a reasonable time therein specified, to provide a sufficient water-closet earth-closet or privy and an ashpit furnished as aforesaid, or either of them, as the case may require." The words "or either of them, as the case may require" appear in s. 51 of the Act of 1848 and in that section there were only two alternatives because the earth-closet was not there mentioned, and the words have been copied into s. 36 without any regard to the fact that the word "either" in strictness applies only to one of two, and this is one of three. "If such notice is not complied with, the local authority may, at the expiration of the time specified in the notice, do the work thereby required to be done, and may recover in a summary manner from the owner the expenses

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incurred by them in so doing, or may by order declare the same to be private improvement expenses," and then there is a proviso which does not affect this case. What is said as to that section is this—I will leave out the Act of 1907 for the moment—that it cannot have been intended that the owner who had an option under s. 35 when he was building his house should be deprived of that option or should have no such option given to him by s. 36 in the case of an old house where the water-closet, earth-closet or privy and ashpit are not sufficient. There can be no question that upon the earlier Act it was so dealt with, but I confess I have not myself been much impressed with the force of that argument. It may very well be that in the case of a new house an option may be given to an owner to provide the kind of sanitary convenience which he chooses, and, of course, if that proves sufficient then there is no more trouble about it, but it may not at all have been thought so necessary or so right to give an option in a case where a man has a house with an insufficient sanitary convenience. The insufficient sanitary convenience may or may not be a nuisance or dangerous to health. It seems to me to be a remarkable piece of legislation which would allow a man who has an insufficient sanitary convenience in his house to go on experimenting with it, and effecting some kind of repairs until, after having exhausted his efforts and having produced no proper result, it becomes apparent that something else must be done.

The authority have to see that the health of the public in their district is protected, and in order to do that they have to see that the houses are provided with proper sanitary conveniences, and I do not think it would be in the interests of the public to allow a man who has an insufficient sanitary convenience to go on experimenting to see whether he can put it right when the local authority is quite convinced of the fact that he cannot, and when the fact may be (because we must assume that in order to test the argument) that he cannot, and it is obvious to everybody that he cannot, and that some other kind of sanitary convenience must be provided. I should certainly approach this question without

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any feeling that even if he had an option under s. 35 and had not an option under s. 36 there is anything anomalous or extraordinary in it. But we have to look at s. 36 to see what it means and whether it does give power to the local authority to determine the kind of work that must be done in order that there may be a sufficient water-closet or other sanitary appliance, and then give notice that that particular kind of work should be done. As has been pointed out, prima facie the section would seem to assume that there is that power, because the second part of it authorizing them to enter and do the work is to do the work which is specified in the notice, and therefore it seems on the face of it to contemplate that the notice shall specify the work that is to be done, and not simply say: Put this right in one, two, or three different ways, as you like. It certainly seems to contemplate the specification of some work, or the requirement of some particular work. Looking at this section apart from authority, I should have come to the conclusion that by the words "or either of them as the case may require" which conclude the first part of the section, it was intended that the local authority should have power to require either a sufficient privy, if the existing privy was insufficient, or if they honestly and properly came to the conclusion that it could not be made sufficient, and that it was necessary to change it into a water-closet, then to require that there should be a water-closet. But the matter is not free from authority. It was decided quite clearly in my opinion by Stirling J. in *Nicholl* v. *Epping Urban Council* (1) that such was the power of the local authority. It was properly conceded in the Court below that P. O. Lawrence J. was not technically bound by that decision, but practically he was bound by the decision of a Court of co-ordinate jurisdiction. But we are not bound and can overrule it if we think it was wrong. The headnote, I think, quite accurately states the effect of the decision. "Held, that a local authority had power under this section, upon being satisfied that a house within their district was without a sufficient privy, to require the owner (subject to his

(1) [1899] 1 Ch. 844.

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right to appeal to the Local Government Board under s. 268) to provide a sufficient water-closet in place of the existing privy." That decision is more than twenty years old, and so far as I know it has not been questioned, except in a dictum to which I shall presently refer. But that decision does not really stand alone, because in *St. Luke's Vestry* v. *Lewis* (1), decided more than sixty years ago, there was a decision of the Court of Queen's Bench, not upon this statute, because this statute had not been passed, and not upon the statute of 1848, but upon the Metropolis Management Act, 1855, the language of which, so far as the sections with which the Court was dealing go, was, in my opinion, the same as the language of the Act of 1875. The three learned judges, Cockburn C.J., and Wightman and Crompton JJ., all laid great stress, as might be expected, upon the words " or either of them " contained in that Act. I rather think that in that Act the word " either " was used, as it is here, as referring to more than two things. There is therefore an authority of the Court of Queen's Bench in 1861 and the authority of Stirling J. in 1899 in support of what I think is the right construction of s. 36. It is quite true that in *Smith* v. *Greenwood* (2) there is a dictum to the contrary by Lord Alverstone which I am bound to say, looking at the report, I fail to understand. I cannot understand it because *Nicholl* v. *Epping Urban Council* (3) was mentioned in the argument, and I think if Lord Alverstone had meant seriously to say that that case was wrong he would have said it in a much less summary way than appears in the dictum as reported, and I must say that I think the learned editors of Lumley on Public Health, 8th ed., vol. i., p. 97, have treated that dictum in the way that we ought to treat it. Their note on it seems to accept the construction which I think is the right one, " A dictum apparently to the contrary in *Smith* v. *Greenwood* (2) must, *semble*, be disregarded." I think we may remove the " *semble* " and say that in view of the state of the authorities the dictum must be disregarded.

(1) 1 B. & S. 865. (2) [1907] 2 K. B. 389.
(3) [1899] 1 Ch. 844.

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I have great doubts whether it can be quite accurately reported. Therefore, so far as the construction of s. 36 goes, I think the section does give the right which is claimed by the local authority.

Before I go to the Act of 1907 another point was taken which I confess I have not been able to follow with any clearness. I rather think P. O. Lawrence J. found the same difficulty. The point is that because there are provisions in s. 41 and ss. 94–96 of the Act of 1875 by which greater powers are given to the local authority to deal with these sanitary conveniences if they become nuisances and injurious to health, therefore they can only deal with them under the nuisance sections. I cannot follow the argument. Sect. 36 gives power to deal with a sanitary convenience which is insufficient whether it is a nuisance or not. Sect. 41 gives additional powers where the sanitary convenience is a nuisance or injurious to health. I cannot see why that section prohibits or in any way cuts down the power of the local authority to deal with an insufficient convenience within s. 36, because it may also be a nuisance. Sect. 36 gives power to deal with it if it be insufficient, whether it is a nuisance or not. There are other sections (ss. 94–96) which give power to deal with it in a drastic way if it is a nuisance, but not otherwise. I cannot see how those sections can in any way limit the power under s. 36 nor how it can be said that a case does not come within s. 36 if the insufficiency be proved, because it would also fall under the other sections. Therefore looking at the Act of 1875 alone I think the respondents are right upon the construction of the section.

But an argument has been founded upon the Act of 1907. That Act takes away from the owner the option given to him by the Act of 1875 in the case of a new house. I do not think that affects this question at all. The Act of 1907 also provides in sub-s. 4 of s. 39 a power enabling the local authority, without the necessity of proving that any particular privy is insufficient, to substitute for privy accommodation water-closet accommodation. But if they

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act under that power the expense is to be divided between the owners and the local authority, that is to say, the ratepayers are to bear half the expenses. That section, it seems to me, can have no bearing upon the present question. It deals with an entirely distinct matter. If a particular house is found to have an insufficient privy or other sanitary appliance, then on my construction of s. 36, the local authority may, if it be shown to be necessary, require the provision of a water-closet. Under sub-s. 4 of s. 39 of the Act of 1907 they need not find that any particular house has an insufficient sanitary appliance, but they may make a scheme which they may carry out at the expense of the ratepayers, irrespective of whether a particular privy is sufficient or not, for converting privies into water-closets. The two sections are dealing with entirely different matters. But the stress of the argument on the Act of 1907 is chiefly laid upon sub-s. 3 of s. 39, and that provides: "If, on the report of the medical officer or the surveyor or the inspector of nuisances, the local authority are satisfied that sufficient closet accommodation"—I pause there to point out that those words are different from those of s. 36, "without a sufficient water-closet, earth-closet, or privy"—"has not been provided at or in connection with a building, and the case is not one in which sufficient closet accommodation can be provided by the alteration of any existing closet accommodation in pursuance of this section, the local authority, where there are a sufficient water supply and sewer, may by written notice to the owner or owners of the building require the building to be provided with such number of proper and sufficient water-closets and slop closets, or with such one or more of either class of closet, as the circumstances of the case may render necessary." And there is a provision that if the owner does not comply with the notice the local authority may do the work. It is said, as far as I understand the argument, that that throws a light on the meaning of s. 36 and shows that s. 36 can never have been intended to give the right to require a conversion of a privy into a water-closet, because sub-s. 3 gives the

power to require it under totally different circumstances. It is an argument which I find difficult to follow. I think myself that sub-s. 3 of s. 39 is directed in the first instance not to the sufficiency of the closets or privies in the sense of their being sufficient for their work but to what it says, "sufficient closet accommodation," that is to say, primarily to the question of the amount of closet or privy accommodation. I do not say it is necessarily limited to such circumstances, and I do not say that cases may not come under both s. 36 of the earlier Act and sub-s. 3 of s. 39 of the later Act. They may. But there is nothing in the later Act which in any way repeals or limits the effect of the sections of the earlier Act, and the only argument addressed to us that can prevail is the argument, that if the power claimed is given by s. 36, sub-s. 3 of s. 39 of the later Act is otiose and useless. It seems to me that that is an argument which might have great force if it were well founded in fact, but it is not, because on no view is sub-s. 3 of s. 39 otiose or useless. It undoubtedly gives power to deal with a case of this kind where a building has one, or possibly two, perfectly proper efficient and sufficient water-closets or privies, but it has not sufficient closet accommodation at or in connection with the building; if that be the state of things sub-s. 3 of s. 39 is applicable, and s. 36 is not applicable because s. 36 only deals with a building which is without a sufficient water-closet and not with a building which is without sufficient closet accommodation. It is also to be noticed that by s. 11 of the Act of 1907 all powers given by that Act to a local authority are to be in addition to and not in derogation of any other powers conferred upon such local authority by any Act of Parliament, law, or custom, and that such other powers may be exercised in the same manner as if the Act had not been passed.

I hope I have dealt with the arguments on s. 36 fairly. In my opinion on the authorities and on the construction the local authority are right in their contention. Of course the two questions (1.) whether that is what the section empowered the local authority to do and (2.) whether the local authority

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in any particular case have been right in what they have done must not be confused. Those are two totally different questions. I will refer again to Stirling J.'s judgment in *Nicholl* v. *Epping Urban Council*. (1) He said: "It was objected that, on the defendants' view of the law, an owner, having provided accommodation in accordance with s. 35, might within a year or other short time be compelled under s. 36 to provide accommodation of a different kind. That, however, could only happen in two events: first, upon the local authority being satisfied that the existing accommodation was insufficient; and, secondly, upon it being shown that the circumstances of the particular case required another kind of accommodation." With that I entirely agree. The local authority must be satisfied that the existing accommodation is insufficient, and also that the circumstances of the particular case require another kind of accommodation, that is to say, that the existing privy could not be put right from a practical and reasonable point of view by amendment but that the provision of a water-closet was required. They have to be satisfied of that, and I think it is for them in the first instance to consider whether that is the kind of provision that is to be made. But, again, as was pointed out by Stirling J. (2): "On both points the owner would have a right of appeal," that is to say, the right of appeal in the old days to the Local Government Board and now to the Ministry of Health. The only other alternative, in my opinion, would have been what I said, a possibility that the justices when the local authority sued for the expenses might be able to inquire into those facts. I am told it has been decided that they cannot do so, and that is what I should have expected to be decided because the appeal, formerly to the Local Government Board and now to the Ministry of Health, is given for the very purpose of giving a person the right to get the notice set aside and the decision reversed if that authority consider that it is wrong. In any case I am quite satisfied that the person who objects to the notice cannot come to the Court to have the question decided whether the particular convenience is

(1) [1899] 1 Ch. 844, 851. (2) Ibid. 851.

insufficient and whether the circumstances are such as to require a water-closet. P. O. Lawrence J. was of that opinion, and I agree with him. It is true that he went on and investigated the facts and came to the conclusion that in fact the local authority were right in this case. That is a matter with which I do not intend to deal, because I do not think it is before us, but I must not be taken as expressing any dissent from his decision on that point. I simply say nothing about it because I do not think it is a point for us to decide.

That brings me to the other point with reference to the powers in s. 36 with regard to the ashpits, because the local authority have by notice required both a water-closet and an ashpit, with an intimation that a dustbin will be sufficient to take the place of an ashpit. There may be a little doubt about the interpretation of this section, that is to say whether it deals with an ashpit which is not in connection with a privy. The collocation of the words may point to the section being primarily concerned with an ashpit which is an adjunct to or part of a privy such as is usual, but I am told that there is no other power to deal with the question of ashpits at all, and I think the section must be construed so as to give the local authority powers to deal with an ashpit, although they are not dealing with it in connection with a privy.

I pass now from the question of the construction of the section to the other point which is a question of fact on which I need say very little, for reasons which I shall give in a moment. It is said that this notice was not given bona fide in the sense that the local authority had come to the conclusion that they ought to put in force a general scheme of conversion of privies into water-closets throughout the whole district, irrespective of whether the privies were, as privies, sufficient or not, that they found if they did that directly and ostensibly under the powers of the Act of 1907, part of the expense would fall upon the ratepayers and that they therefore decided that they would not do it directly and honestly, but indirectly and dishonestly, that is to say, that they would direct their sanitary inspectors and their inspectors of

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nuisances to report as insufficient conveniences which were not insufficient in order that they might be brought under s. 36 and then, when that had been done, that they themselves would decide that the privies were insufficient although they were not so, in order that they might be able by using that part of the Act to enforce the conversion that they wanted to effect by their general scheme at the expense of the owners alone and not at that of the owners and ratepayers jointly. That is a very serious allegation against the members of the local authority and even more serious against their officials, their inspectors of nuisances and their sanitary inspectors. It is one that ought to be strictly proved, just as any allegations of misconduct by persons in public positions ought to be proved. The learned judge heard all the evidence on both sides. It was given viva voce, and he came to the conclusion that it was proved to his satisfaction that the whole thing was done perfectly bona fide. This is of course a rehearing, and if we thought that the learned judge was wrong we should be perfectly at liberty to come to a different conclusion. But it is always, as has often been pointed out, a difficult thing to upset the finding of a learned judge upon a question of fact, where he has dealt with it upon oral evidence and has formed his conclusion upon what he saw and heard of the witnesses. No doubt it can be done. [His Lordship then referred to the evidence and said that he could see no ground for interfering with the learned judge's finding.]

I would like to say a word or two upon two matters upon which great reliance was placed. One was with regard to a resolution passed in 1918 which was in these terms: "The clerk reported that the medical officer, with their sanitary inspector along with himself had held a consultation at his office as to the conversion of privies and the erection of new w.c.'s. It is suggested that every case of an alleged defective privy reported by an inspector be considered separately on its merits." Subject to one observation one would think that that was the right thing to do. The resolution goes on: "If the Committee are

satisfied that it is defective, a notice be served on the owner under s. 36 of the Public Health Act, 1875, giving him notice to convert same into a w.c. if the public water supply and drainage are all right." In s. 36 there is not any such condition about public water supply and drainage being all right, and I suppose, subject to appeal to the Local Government Board, under s. 36 that might apply to a water-closet where there was no water, but no sanitary authority in their senses would do that; but here, when they are considering what they will do, they will only act in that way if the water supply and drainage are all right: "Also that any insufficiency in number be dealt with under s. 39 of the Public Health Act, 1907." That is alluding no doubt to sub-s. 3 of s. 39, which I think they were right in thinking was primarily directed to insufficiency in number, "and further, that where existing privies are in fair repair any conversion of same into w.c.'s be done under s. 39 at the joint expense of the owner and the Council, the surveyor to corroborate the inspector as to whether such privies are defective or not. It was resolved that such suggestions be adopted by this Committee and acted upon." I should have thought that a more harmless resolution could hardly have been conceived; but it is said that that shows that the respondents were mala fide contemplating carrying out a scheme, which ought to be carried out under the Act of 1907, by means of an improper use of the Act of 1875. One thing, and I think almost the main thing, relied upon is this, that the suggestion of the officials contains the word "defective" and not "insufficient," and, it is said, that shows that whether insufficient or not, the Council were going to have a privy reported upon as defective and were going to act upon the resolution if the privy were defective to any extent, although it was not insufficient under s. 36. I should have thought on reading it that they were using "defective" in the same sense as "insufficient." But it really does seem to me extremely far-fetched to say that this resolution shows an intention of acting mala fide. In the first place, it is not the same Council, it is a resolution of another council

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and another committee—no doubt a good many of the members would be the same. In the second place, it is important to notice that the report was that the houses were without a sufficient water-closet, earth-closet, or privy, following the words of the Act and corroborating what I should have thought, that they were using "defective" as equivalent to "insufficient" when they were going to put into operation the section of the Act of 1875. The report was, as I say, that they were without a sufficient water-closet, etc. The fuller report which is in the inspector's note-book or diary gives the reason why they are insufficient. It says: "I report that the privies 38 and 39 King Street, which empty into one midden are insufficient within the meaning of s. 36 of the Public Health Act 1875 from the middens containing a large quantity of water and other things," and points out the respects in which they are insufficient. So when the Council came to act upon the resolution they acted upon it as if the word "defective" meant "insufficient," as, in my opinion, it was intended to. Then it was said, though I do not think much was made of this point, that the inspector of nuisances showed a bias and a want of good faith because he said that there ought to be a water-closet, whereas it was not for him to decide. Technically, that is right, it was not for him to decide, but if he had reported that there ought to be a sufficient accommodation the first thing that would have happened would have been that the Sanitary Committee would have asked him what he thought ought to have been done, and he would then have explained, as I shall point out in a moment he did when he was asked, that it wanted a water-closet and the reason why it wanted a water-closet. I can see no objection to his putting in his report and telling the Council what he thought ought to be done. It does not bind them; there does not seem to me to be any wrong in his doing it; he was merely anticipating the information which he would have had to give them later on. It was also said that the report was not properly considered, that nobody ever considered the possibility of there being any other way of dealing with the matter than by providing a water-closet. The unfortunate thing

about that statement is that it is not the fact. [His Lordship referred to the evidence of the inspector of nuisances on this point and continued:] I only read that evidence to show that the matter was brought before the Committee and was considered by them and that they did not accept the report as a whole without consideration. This very matter was brought before the Committee and considered by them. The learned judge has come to the conclusion that the inspector of nuisances was right in fact. As to that, I express no opinion, for the reasons I have already given.

Therefore it seems to me that the appeal fails on both grounds, first, because I think the appellants are wrong in the limited construction that they seek to put upon s. 36, and, secondly, because the bulk of their case, which took so many days in the Court below, and some time here, is founded entirely upon a question of fact, upon which the learned judge has found against them on material which, in my opinion, does not justify us in questioning his decision. I think, therefore, the appeal fails and must be dismissed with costs.

WARRINGTON L.J. On the question of fact which only concerns the parties to this particular action I am quite content with the judgment of the learned judge, and have nothing to add to what has been said in respect thereof by the Master of the Rolls; but the question of law is one of general interest affecting local authorities all over the country and I think therefore that I ought to express my view on the construction of the section in question in my own words. What is contended is that a local authority purporting to act under s. 36 of the Act of 1875, and being satisfied that the existing privy accommodation is insufficient, are not entitled under any circumstances to order the conversion of that privy into a water-closet but are only entitled to require that the house shall be provided with an accommodation of some sort and to leave it to the owner to determine whether he shall comply with that requirement by maintaining the existing privy and repairing or restoring it. The words of the section, with all respect to

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the arguments which have been addressed to us, seem to me to be quite clear. The section is in these terms: "If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet earth-closet or privy and an ashpit furnished with proper doors and coverings, the local authority shall, by written notice, require the owner or occupier of the house, within a reasonable time therein specified, to provide"—now come the material words —"a sufficient water-closet earth-closet or privy and an ashpit furnished as aforesaid, or either of them, as the case may require." They have then the power to require the owner to provide certain things "or either of them," as the case may require. It has been pointed out by Stirling J. in *Nicholl* v. *Epping Urban Council* (1) to which I shall afterwards refer, and I think is reasonably clear, that in order to exercise the power of the section at all they have first to be satisfied that the existing accommodation is insufficient, or rather—there may be no existing accommodation at all—that the house is without a sufficient accommodation. Having come to that conclusion they have further to come to the conclusion that the case requires a particular form of accommodation; that is to say, not a particular form in a matter of detail, but one of the three forms of accommodation specified in the section. If they come to the conclusion that the case does require it, then it seems to me they are satisfying the plain words of the section if they select for the purposes of their notice that one of the three forms of accommodation which the case requires, and they would not be satisfying the section unless they did so. In my opinion, therefore, the local authority on the construction of this section have power under these circumstances, if the necessary conditions are fulfilled as expressed in the statute, to require the conversion of a privy into a water-closet.

This is the first occasion on which the interpretation of this section has come before this Court, but the point is not without authority in the Courts of first instance. In 1899 Stirling J. decided the precise point in *Nicholl* v. *Epping*

(1) [1899] 1 Ch. 844.

Urban Council (1), and I venture to think that that decision was correct. In *St. Luke's Vestry* v. *Lewis* (2), the Court of Queen's Bench, consisting of Cockburn C.J. and Wightman and Crompton JJ., came to the same conclusion, not on the same statute, but on a statute which, having regard to the judgments which were pronounced, contained for all practical purposes the same provision as the present statute. We have, therefore, so far, the decision of Stirling J. and the decisions of the three other judges. There is no decision to the contrary. It is said that there is a dictum of Lord Alverstone C.J. in *Smith* v. *Greenwood* (3) which is inconsistent with the decision of Stirling J. in *Nicholl* v. *Epping Urban Council.* (1) With all respect I, like the Master of the Rolls, have great difficulty in understanding how it came about that the Lord Chief Justice used expressions indicating dissent from what had previously been decided by Stirling J. without expressly saying that he did dissent from it. That dictum, therefore, with all respect must be disregarded. Then it is said that there are expressions in a judgment of Lord Halsbury in *Wood* v. *Widnes Corporation* (4) which show that Lord Halsbury thought that the local authority was bound to give to the owner an option as to the form of accommodation which he would provide. The words which Lord Halsbury uses are: "The only question we have to determine in this case is whether on the facts the respondents did or did not comply with the requirements of the statute, and give to the proprietor the opportunity of determining what particular form of accommodation he would adopt, subject to the power of the authority to insist that whatever form he adopted must be efficient." Statements of learned judges and the judgments they deliver must be read in connection with and in relation to the questions they have to determine. In *Wood* v. *Widnes Corporation* (4) the Corporation had affected to impose on the owner the obligation, not merely of converting his privy into a water-closet, but into a particular form of water-closet, and

(1) [1899] 1 Ch. 844.
(2) 1 B. & S. 865.
(3) [1907] 2 K. B. 385, 389.
(4) [1898] 1 Q. B. 463, 466.

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it is that to which in my opinion Lord Halsbury is alluding, as he does in direct terms, when he comes to deal with the question later on in his judgment. When he says "the opportunity of determining what particular form of accommodation he would adopt," I think he is alluding to the very arbitrary requirements exacted by the Corporation in that case that the owner should adopt a particular form of water-closet approved by them. It seems to me, therefore, that the supposed dictum of Lord Halsbury, contrary to what was said by Stirling J. in *Nicholl* v. *Epping Urban Council* (1), and contrary to the view expressed by the Master of the Rolls and myself, does not exist. It is not necessary to say more about it. It has been contended that in some way or another the Act of 1907, and particularly s. 39 of that Act, has limited or restricted the powers given by s. 36 of the Act of 1875 by throwing a light upon the construction of the previous section in the direction of restricting the effect of that section. In the first place I am of opinion that that would be an entirely improper use to make of a subsequent Act of Parliament, but further, to give any effect to that contention would, it seems to me, be acting directly in opposition to the provisions of the Act itself.

The Act of 1907 in s. 11 contains a provision that "All powers given to a local authority under this Act shall be deemed to be in addition to and not in derogation of any other powers conferred upon such local authority by any Act of Parliament, law, or custom,"—then come these words "and such other powers may be exercised in the same manner as if this Act had not been passed," showing to my mind quite clearly that the subsequent Act was in no way to interfere with the powers conferred by the previous Act. But when s. 39, and particularly sub-s. 3 of s. 39 of that Act is referred to, it seems to me, with all respect, that sub-s. 3 and s. 36 of the Act of 1875 relate to different matters. They may overlap, but sub-s. 3 of s. 39 of the Act of 1907 is much wider than s. 36 of the Act of 1875. Sect. 36 could not come into operation if there were a single privy or water-closet which was

(1) [1899] 1 Ch. 844.

sufficient in the house in question. Sect. 39 gives power to the authority to interfere notwithstanding that there is a privy or water-closet which is sufficient if on the whole the closet accommodation is not sufficient. Now that power was not conferred by the Act of 1875. The operation of s. 36 would have been excluded if it could be shown in the case of a house that there was a privy or other sanitary convenience which was sufficient.

I agree with the construction placed on the section by the learned judge and by the Master of the Rolls and I have already said that I agree with the findings of the learned judge on the question of fact. I think, therefore, that the appeal should be dismissed.

YOUNGER L.J. I do not see my way on this appeal to review any finding of fact of the learned judge. I say this, although it is true, in my view, that the written word alone might well lead a reader to conclusions less favourable to the defence than those reached by him. Nor would such conclusions be without strong support from the terms of this Council's resolution, from the form of their official's reports, from their consistent action, invariably and with uniformity, to order the substitution of a water-closet for a privy within their area in any case in which insufficiency of existing accommodation had been established to the satisfaction of their surveyor. Such unfavourable conclusions again would not be unassisted by the consideration that the circumstances of at least two out of the four houses here in question seem in this matter of sanitary accommodation to be structurally indistinguishable from the circumstances of many, if not most, of the other 1400 or 1500 houses belonging to the plaintiffs within the Council's area, and that moderation in action in this matter of the provision of water-closets throughout their area is not what one would naturally expect from the members of a Council, pledged, as we have been told the members of this Council were, on their election, to substitute water-closets for privies whenever possible, at least when that substitution could be effected without charge upon the rates. Nor again would such conclusions be unassisted by the

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consideration that these defendants, having satisfied themselves that the rates cannot bear the expense involved in carrying out a scheme of substitution under sub-s. 4 of s. 39 of the Act of 1907, and being perhaps impressed with the difficulty of complying with the necessary conditions of sub-s. 3 of s. 39 of the same Act, may well have been tempted to take a generous view of their powers under s. 36 of the Act of 1875. All these considerations do, to my mind, raise doubts as to the correctness of the learned judge's conclusions of fact, and they must give one pause before accepting them. But in my judgment, as in the judgment of my Lord, they are not sufficient to countervail the advantage possessed by him in reaching a true conclusion on the evidence as a whole in that in this strongly contested case he saw the protagonist witnesses on both sides. Accordingly, as I began by saying, I do not feel at liberty to review any of his findings of fact. I do, however, desire to add this, that as I see this case, the respondents must not attach too much importance to these findings as reached by the learned judge after hearing the witnesses in this litigation. The findings might well be quite different in another case. The defendants, from the discussion which has taken place in the course of these proceedings, have now had very clearly pointed out to them their duty when exercising the powers which they are held to possess under s. 36 of the Act of 1875, and they are now well warned that the valid exercise of those powers can only take place, if, when called upon, they are able to establish that they have complied with the conditions laid down by Stirling J. in *Nicholl's Case* (1) to which so much reference has been made.

In view of the learned judge's finding, which I do not treat as being open to review, no point remains to the appellants except the question of construction arising on s. 36 of the Act of 1875. Now for a very long period of the argument, I myself felt great difficulty as to the true construction of that section, and I was uncertain whether, if the matter were free from authority, I should have been prepared

(1) [1899] 1 Ch. 844.

to attribute to it the meaning which the learned judge and such authority as there is upon the section, has, as it seems, attached to it. But I am at length satisfied that even if there had been no authority on the subject the conclusion which has been reached by the learned judge, and which has just been announced by my Lord as to the true effect of the section, is the correct one, so that, not even that point avails the appellants.

There is only one small, and probably unimportant aspect of the case relating to the meaning of s. 36 as to which I should wish to say a single word. It turns upon a matter which was alluded to by the Master of the Rolls. I think there can be very little doubt that under the corresponding section of the Act of 1848, from which s. 36 is taken, the ashpit there referred to was to be used only in connection with the privy, and that there was no independent power under that section given to the authority to direct an ashpit to be constructed in addition to a water-closet. It may be somewhat difficult to say that that is the true construction of s. 36, and there is a difference of opinion between the two counsel for the appellants as to which is the true construction of the section in that matter. Presumably, however, even if Mr. Scholefield's view of the section were well founded—namely, that "ashpit" must be used only in connection with "privy," and that accordingly the order which was made by this authority upon the appellants to construct not only a water-closet but also an ashpit, is in excess of their powers, it would not affect the validity of the order so far as the water-closet is concerned, which, of course, is the substantial question in dispute between the parties.

Accordingly, I agree with my Lord and the Lord Justice in thinking that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Hancock & Willis, for Wake & Sons, Sheffield.*

Solicitors for respondents: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

W. I. C.

C. A.
1922
EVE J.
Feb. 2.
C. A.
May 18.

In re LORILLARD.

GRIFFITHS *v.* CATFORTH.

Administration—Conflict of Laws—Testator domiciled in America—English Will—Assets and Creditors in England and America—American Administration with Will annexed—American Estate exhausted—American Judgments in Respect of Debts Statute barred in England—Surplus in English Administration—Claim by American Administrator.

The testator, domiciled in New York, died in England leaving assets and creditors both in England and America. Administration proceedings were taken in both countries. In the English administration, after payment of all creditors, there was a surplus available for beneficiaries. In the American proceedings the assets were exhausted leaving unpaid certain creditors whose debts were statute barred by the law of England, but not so by the law of New York. The English Court gave the American creditors a limited time to come in and prove their debts, which however they did not do. Upon a claim by the American administrator to have the surplus English assets transferred to him for distribution among the American creditors:—

Held, that the English Court, having exercised its discretion, was not bound to order the surplus assets to be transferred to America.

THE testator, domiciled in the State of New York, died in England on April 28, 1916. He left assets and creditors both in England and in America. His will was proved by his widow in America on October 21, 1916, and by his widow and the plaintiff, Griffiths, in England on January 4, 1917. The widow died on February 15, 1918, and on May 31, 1918, letters of administration with the will annexed were granted in America to Ernest Lorillard the testator's son. He acted as administrator until February, 1921, when the grant to him was revoked, and a fresh grant was, on March 21, 1921, made to the applicant, Ira Lorraine Miller. The result of the American administration was that the estate left in the hands of Ernest Lorillard in February, 1921, was insufficient to discharge the claims of certain judgment creditors in that country who were asserting their rights there to payment out of the estate. It appeared that these debts would have been statute barred in England but were not so in America. The English administration proceeded in due course, and the surviving executor here believing that he had discharged

all claims properly maintainable against the estate in England, but, wishing to make the matter clear, in November, 1920, obtained an order for the administration of the estate in this country, the proceedings thereunder being limited to the inquiry as to the testator's debts. On October 28, 1921, a certificate was made certifying that there were no debts of the testator remaining unpaid. The result was to leave a surplus of assets in this country amounting to between 2000*l.* and 3000*l.* in the hands of the executor, and he asked the Court for directions as to how he ought to dispose of this surplus: ought he to pay it to the beneficiaries, or was he precluded from doing so by reason of the fact that he had notice of the claims of judgment creditors in America, although such creditors had deliberately abstained from coming in to prove in the administration action in this country? Side by side with the executor's summons for directions, the American administrator issued a summons asking that the balance might be ordered to be paid to the American administrator, and the two summonses came before Eve J. It was said that so far as the English executor was concerned he was protected by the certificate in the action and that the surplus was prima facie held for the persons beneficially entitled after the creditors had all been paid. On the other hand, the American administrator contended that it was held, not for the persons beneficially entitled, but for the persons who under the law of the testator's domicil still had claims against that surplus in respect of debts contracted in the country of domicil, and inasmuch as those creditors could be more conveniently ascertained in that country—or rather, putting it somewhat higher, inasmuch as those creditors had in fact been ascertained in that country, he argued that the Court ought to order payment of the balance to the administrator acting in the country of domicil, and leave him to apply it in accordance with the law there, which would mean satisfying pro tanto the debts of the judgment creditors.

The summonses were heard before Eve J. on February 2, 1922.

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Courthope Wilson K.C. and *Hodge* for the applicant. The assets of the deceased were collected here, and they are available for creditors in any country who come in and prove their debts. At the date of the death these debts would have been statute barred in England, but not in New York. In *Ewing* v. *Orr-Ewing* (1) Lord Selborne deals with the discretion of the Courts of the country where the ancillary administration is granted, to decree a distribution of the assets or to remit them to the forum of the domicil of the deceased. The main rule is that the Court will avoid anything that would produce injustice, inconvenience, or conflicting equities. It is established that there are debts in America which render the American estate insolvent, and judgments have been obtained in America by the creditors. These judgments give rise to new and independent obligations: *In re Henderson* (2); *In re Low.* (3)

The convenient course for the Court to adopt is to direct that the surplus assets in England should be remitted to America.

Gover K.C. and *Beebee* for the plaintiff. It was open to the creditors in America to prove in the administration in this country, but they did not do so because their debts were statute barred according to English law, and consequently they chose the present method of trying to recover their debts. An executor or administrator in this country is bound to plead the Statutes of Limitation, if a beneficiary asks him to do so; that may not be so in America. The only question here is whether the surplus assets should be sent over to America, or distributed here under the direction of the Court.

[EVE J. If the executor had paid over the surplus to the foreign creditors he would have got a good discharge; he need not have come to this Court.]

The foreign creditors ought to have proved here. The English executor can say to them: "I have notice of your debts, but your debts are statute barred." Where a deceased

(1) (1885) 10 App. Cas. 453, 513, 514.
(2) (1887) 37 Ch. D. 244, 256.
(3) [1894] 1 Ch. 147.

is domiciled abroad, but leaves property in England, the assets in England must be administered according to English law. The administration is governed by the lex fori. The duty of an English administrator is to provide for all death duties and all debts everywhere. With regard to surplus assets, there is a question as to the right and duty of an English administrator in dealing with them. Where the administration is under the direction of the Court, the Court will not necessarily pay them out to the domiciliary administrator. The law of domicil is only taken into consideration by English law for the benefit of beneficiaries. Pearson J. in *In re Kloebe* (1) deals with the various propositions in this case. The estate in England must be administered by the English administrator, and it is for this Court to consider whether the surplus assets here should be paid over to a foreign administrator: *Preston* v. *Viscount Melville.* (2) In *Ewing* v. *Orr-Ewing* (3) Lord Selborne disagreed with the opinion expressed by Lord Westbury in *Enohin* v. *Wylie* (4) that "the Court of the domicil is the forum concursus to which the legatees under the will of a testator, or the parties entitled to the distribution of the assets of an intestate, are *required* to resort." In order to recover their debts the American creditors must sue in this country.

[They also referred to *Ellcock* v. *Mapp* (5) and *Ewing* v. *Orr-Ewing.* (6)]

Gordon Brown for the residuary legatee of the widow. The discretion, if any, which the Court has, is solely as to the distribution amongst beneficiaries. If the surplus assets are handed over to the foreign Court they will not go to the beneficiaries. The Court cannot hand over these surplus assets. It is bound to distribute them here.

Courthope Wilson K.C. in reply. If a foreign creditor fails to prove in the English administration, he loses his rights pari passu with the English creditors. The question here is one of convenience entirely at the discretion of the Court.

(1) (1884) 28 Ch. D. 175.
(2) (1841) 8 Cl. & F. 1, 14.
(3) 10 App. Cas. 453, 502.
(4) (1862) 10 H. L. C. 1, 13.
(5) (1851) 3 H. L. C. 492.
(6) (1883) 9 App. Cas. 34.

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If the money is not sent to America, it means that American creditors would have to come here, and that would cause litigation, the cost of which would entirely eat up this small estate.

EVE J. [after stating the facts and the opposing contentions as above set out:] These contentions involve the question whether there is any available surplus to which the law of the domicil is applicable. I think the authorities clearly establish that the only surplus to which the law of domicil is applicable is such surplus as remains for distribution amongst the persons beneficially entitled to the estate, and that until the existence of such a surplus is demonstrated there is no room for the application of the law of domicil. The executor in this country says, I am in doubt whether, in fact, any such surplus exists; it is because I am in such doubt that I apply to the Court for directions; he therefore does not assert the existence of any such surplus. Still less can the American administrator do so, seeing that his case is that, even if the whole of this surplus be transmitted to America, the estate will still be insufficient to discharge the claims of creditors who have established their debts there. I must deal with this, therefore, as an insolvent estate; an insolvent estate to this extent, that there is at present no surplus to which the law of domicil can have any application. What then is the position of the individual to whom the administration of the English assets has been committed? I think that *In re Kloebe* (1) shows exactly what his position is. Pearson J. says there: "I think Mr. Westlake in a passage cited lays down the law perfectly correctly. In s. 102 of the last edition of his work on Private International Law, he says: 'Every administrator, principal or ancillary, must apply the assets reduced into possession under his grant in paying all the debts of the deceased, whether contracted in the jurisdiction from which the grant issued or out of it, and whether owing to creditors domiciled or resident in that jurisdiction or out of it, in that order of priority which

(1) 28 Ch. D. 175, 177.

according to the nature of the debts or of the assets is prescribed by the laws of the jurisdiction from which the grant issued.' " Therefore it became incumbent upon the executors who proved the testator's will in this country to apply the assets in discharge of all the debts of the testator of which they had notice, whether in England or in America, and in so applying the assets to treat the claims of all the creditors as governed by the laws of this country, wherever the debts were contracted, and wherever the creditors may be resident. The surviving executor made an attempt by his action to ascertain definitely all the creditors, and although that attempt has not been successful in that certain of the creditors have not come in to establish their debts under the inquiry, the plaintiff cannot distribute, and I do not think the Court ought to direct him to distribute, the assets that remain after discharging the debts of those creditors who have come in and proved their debts without giving these persons who now assert that they are creditors entitled to participate in the ascertained surplus a further opportunity of coming in and proving their right so to participate. It appears to me therefore that in all the circumstances the proper order to make is to give the American creditors, who may or may not have established debts capable of proof against the assets in this country, a further opportunity of coming in and establishing those debts; and if within a limited time they fail so to do, then to give the executor a direction to distribute the surplus assets amongst the beneficiaries entitled thereto in accordance with the law of the American domicil. The question which exercises my mind is the length of time which ought to be afforded to the American creditors to establish their claims here. I think if I give them a further period of two months, I shall be giving them as long a time as is reasonably necessary for the purpose and accordingly I direct that unless within two months from the date of this order steps shall have been instituted by the American creditors to establish their claims against the assets in this country, those assets must be dealt with by the executor as assets free for distribution among the beneficiaries

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in accordance with the law of the testator's domicil, that is to say, in accordance with the law of the State of New York.

P. J. B.

From this decision the American administrator appealed. The appeal was heard on May 18, 1922.

Courthope Wilson K.C. and *Hodge* for the appellant. It is the duty of an English ancillary administrator, where the deceased dies domiciled in a foreign country, after payment of all debts and claims proved in England, to hand over the distributable residue to a representative of the deceased in the domicil: *Eames* v. *Hacon* (1); *In re Kloebe* (2); Dicey on the Conflict of Laws, 3rd ed., p. 714; Westlake on Private International Law, § 105. The Court has a discretion here to order the administrator to transfer the surplus assets in his hands to the American administrator. Eve J. has not rightly exercised his discretion in the matter. There are unsatisfied debts in America which will exhaust the local surplus, and it is not right in such a case as this that that surplus should be paid to the beneficiaries.

[They also referred to *Harvey* v. *Richards* (3) and *Enohin* v. *Wylie*. (4)]

Gover K.C. and *Beebee*, *W. Gordon Brown* and *J. V. Nesbitt* for respondents were not called upon.

LORD STERNDALE M.R. This is an unusual question arising in certain administration proceedings in this country and in the United States of America. It seems to me to be entirely a matter of discretion, and I do not see my way to differ from the decision of Eve J. The testator, who was domiciled in America, died in this country. Administration proceedings are going on both in America and in England. In England there are no debts. There are debts in America which according to English law are statute barred, but not

(1) (1880) 16 Ch. D. 407; (1881) 18 Ch. D. 347.
(2) 28 Ch. D. 175.
(3) (1818) 1 Mason, 380.
(4) 10 H. L. C. 1.

so according to the law of New York. If claims in respect of these debts had been made here they would rightly have been rejected. The English administrator asked for the directions of the Court as to what course he ought to pursue. For the beneficiaries in England it was contended that the American creditors were completely barred, the debts being over twenty years old. For the creditors in New York it was contended that as the testator was at the time of his death domiciled there the American administration was the principal proceeding to which the English administration was merely ancillary, and that accordingly the applicant as administrator in New York was entitled to receive the surplus assets in England remaining after the satisfaction of the testator's debts in order that they might be applied in paying the debts of bona fide creditors in any part of the world and for this purpose they ought to be transferred to America. The authorities do not throw much light upon the question as to the duty of the English administrator. It would seem to be his duty to see that the debts are paid—i.e., debts which are due according to English law. Eve J. has made an order giving the American creditors a period of two months within which to bring in their claims in this country, and intimating that if they did not do so the surplus assets would be distributed among the beneficiaries. The American creditors, however, did not present their claims, presumably knowing that if they did so they would be rejected. It is argued that it is still the duty of the English administrator to transfer the moneys in his hands to the American administrator. I cannot see any principle under which it is necessary for the English Court in such circumstances to order the administrator here to hand over the surplus assets to the American administrator. No authority has been cited in favour of such a course, and I cannot say that Eve J. has wrongly exercised his discretion in the matter. The appeal must therefore be dismissed.

WARRINGTON L.J. I am of the same opinion. The principle is that the administration of the estate of a deceased

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person is governed entirely by the lex loci, and it is only when the administration is over that the law of his domicil comes in. Here the administrator is acting under the direction of the Court in an administration action, and the master has certified that no debts remain unpaid. It is certainly a matter of discretion for the learned judge whether he should direct the administrator to pay over the balance in his hands to the American administrator. The persons entitled to the unadministered residue are in this country, and the Court will not order these moneys to be sent to an administrator abroad. The learned judge was informed that there were debts owing by the deceased in America, but that these were all debts which here might be barred by the Statutes of Limitation. Opportunity has been given to the American creditors to come in and prove their debts, but they have not chosen to do so.

Under these circumstances, there being no authority conflicting with what the learned judge has done in the exercise of his discretion, I am of opinion that we ought not to interfere with that exercise.

YOUNGER L.J. I am of the same opinion. A certificate has been made that there are no debts unpaid, according to the law of England. The question is one that must be decided according to the law of this country. The appellant asks that the clear residue of the fund may be sent to the United States of America to be there administered, and the learned judge has refused to accede to his application. The only persons whom the American administrator claims to represent, the so-called American creditors, would, if they brought in their claims in this country, be defeated by the statute. It is suggested that the reason why the applicant is entitled to succeed in his application is that the deceased was domiciled in the United States of America, and that debts which are admittedly payable to creditors there ought to be satisfied in preference to the claims of the beneficiaries in this country. But the real reason why the debts are admitted in America is that such debts would be admitted against any testator

in the United States, and not merely against one who was domiciled there. Neither on principle nor authority do I think there is any justification for interference by this Court with the exercise by the learned judge of his discretion in the matter.

Appeal dismissed.

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Solicitors: *Rubinstein, Nash & Co.; Broad & Son; P. Marr Johnson.*

G. A. S.

TERRELL *v.* CHATTERTON.

C. A. 1922 *June* 28.

[1921. T. 2229.]

Landlord and Tenant—Lease—Covenant against Sub-letting without Consent—Underletting of Part of Premises with Consent—Underletting of Remainder without Consent—Breach of Covenant—Forfeiture.

By an agreement dated March 11, 1919, the plaintiff let a house to the defendant for three years at a rent of 135*l.*, the defendant covenanting not to assign, underlet or part with the possession of the demised premises without the consent of the plaintiff, such consent not to be unreasonably withheld. On February 14, 1920, the defendant, with the consent of the plaintiff, underlet the top floor of the house for the remainder of the term at a rent of 90*l.* On February 28, 1920, the defendant, without the knowledge or consent of the plaintiff, sub-let the remainder of the premises on a yearly tenancy with the option to the sub-lessee to continue the sub-tenancy for the residue of the original term at a rent of 180*l.* The defendant had delivered possession of the premises to the respective sub-tenants. In an action for a declaration that the covenant had been broken so as to entitle the plaintiff to forfeit the lease, the plaintiff claimed possession of the premises and mesne profits in excess of the rent paid to him by the defendant as from the date of the breach. Astbury J. held that, as the covenant did not extend to the sub-letting of a portion of the premises without consent, there had been no breach, and he dismissed the action:—

Held, by the Court of Appeal, that although the sub-letting had been effected in two separate transactions the defendant had in fact sub-let and parted with the possession of the whole of the premises without consent. The consent given to the first sub-letting did not extend to the second. There had therefore been no consent to the sub-letting of the whole, and the covenant had been broken so as to involve a forfeiture of the lease.

Decision of Astbury J. reversed.

APPEAL from the decision of Astbury J.

By an agreement in writing dated March 11, 1919, the

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plaintiff let to the defendant, Mrs. Chatterton, No. 27 Collingham Place, Kensington, from March 25, 1919, for the term of five years at the yearly rent of 135*l.* The agreement contained a clause providing that the tenant should not assign or underlet or part with the possession of the demised premises without the consent in writing of the landlord for that purpose first had and obtained, such consent not to be unreasonably withheld, and as a condition of such consent the landlord might require the assignee to enter into an agreement with him to observe and fulfil all the conditions and obligations of the agreement.

In February, 1920, the defendant applied to the plaintiff for leave to sub-let the rooms on the top floor of the premises to one Pizer, and the plaintiff gave his consent thereto. The term was for three years from February 8, 1920, at the yearly rent of 90*l.* By an agreement in writing dated February 28, 1920, the defendant let to one Pierre J. Boucher all the rooms, basement, etc., of the house (excepting the rooms on the top floor already sub-let to Pizer) on a yearly tenancy from May 1, 1920, at the yearly rent of 180*l.*, with the option of continuing the tenancy until the expiry of the lease of March 11, 1919. The defendant did not ask the plaintiff for his consent to this second sub-letting, nor did the plaintiff know of it until June 30, 1921, when he immediately gave notice to the defendant of her breach of agreement, determining the said tenancy and demanding possession of the premises. The defendant had paid her rent to the plaintiff under the tenancy agreement on June 24 and September 29, 1921, and the same had been accepted by the plaintiff under an agreement that such acceptance should be without prejudice to any questions at issue between the parties.

On October 26, 1921, the plaintiff brought this action against the defendant claiming (1.) a declaration that the agreement of February 28, 1920, was a breach on the defendant's part of the tenancy agreement of March 11, 1919, and entitled the plaintiff to forfeit the said agreement and the tenancy created thereunder; (2.) possession of the said premises; and (3.) mesne profits from February 28, 1920. The action was tried

by Astbury J., who on March 29, 1922, dismissed it. In the course of his judgment he pointed out that the covenant in question did not apply to assigning underletting or parting with the possession of any part of the premises, and in the next place it clearly referred to such an assignment underletting or parting with possession as would enable the landlord on his consent being applied for to insist, as a condition of giving his consent, upon the assignee or under-lessee entering into an agreement with him direct to observe and fulfil the whole of the conditions and obligations of the original agreement. It was extremely unlikely that the parties contemplated that if one floor of the premises was sub-let the sub-lessee should agree to be bound by all the conditions and obligations of the lease in so far as they related to the rest of the house. Covenants of this character ought to be construed strictly against the landlord, especially where there was any ambiguity arising from their terms. The covenant in this case applied only to an underletting of the house as a whole, where the landlord could reasonably demand that the assignee should enter into an agreement with him to observe the whole of the covenants of the lease. The plaintiff having assented to the underletting of the top floor could not rely upon a breach of covenant with regard to an underletting of any other portion of the house. His Lordship thought that the consent of the plaintiff under the covenant was only required when the defendant was, at one and the same time, proposing to sub-let the whole of the premises, in which case the assignee or under-lessee could be called upon to enter into privity of contract with the plaintiff. His Lordship then referred to *Church* v. *Brown* (1) as showing that a covenant against underletting the whole of the premises was not broken by underletting a part; and to *Crusoe* v. *Bugby* (2), in which it was said that "The Courts have always held a strict hand over these conditions for defeating leases. Very easy modes have always been countenanced for putting an end to them." In *Grove* v. *Portal* (3) Joyce J. had explained and followed

(1) (1808) 15 Ves. 258. (2) (1770) 2 W. Bl. 766, 767.
(3) [1902] 1 Ch. 727.

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these authorities. In *Wilson* v. *Rosenthal* (1) there was a covenant against underletting leasehold premises without consent and counsel submitted that there was no breach, because at no one time were the whole of the premises underlet, and that was what the covenant forbade. Sutton J. there said: "On the evidence I am not satisfied that the whole of the premises ever were let out in parts at any one time." In the present case, in his Lordship's opinion, the defendant had not sub-let the whole of the house without the consent of the plaintiff, and the action must be dismissed.

The plaintiff appealed.

E. P. Hewitt K.C. (*Bovill* with him) for the appellant was prepared if necessary to argue that the older decisions were wrong.

[He was stopped by the Court.]

Micklem K.C. (*Edgar Dale* and *Everard Dickson* with him) for the respondent. The whole of the premises have not been underlet without consent. There has therefore been no breach of the covenant. The covenant is in an unusual form and only applies to a sub-letting of the premises as a whole. An underletting of part does not constitute a breach of the covenant.

The Courts have always construed covenants of this character strictly against the landlord: *Crusoe* v. *Bugby*. (2)

Church v. *Brown* (3) is an express authority that a covenant not to underlet the whole is not broken by an underletting of part.

In *Grove* v. *Portal* (4) the authorities were explained and followed by Joyce J.: see also *Wilson* v. *Rosenthal*. (1)

The appellant cannot ask for possession, as he has consented to the underletting of the top floor to Pizer for three years from February 8, 1920. He is not entitled to a declaration.

WARRINGTON L.J. [after stating the facts]. The learned

(1) (1906) 22 Times L. R. 233.
(2) (1770) 2 W. Bl. 766, 767.
(3) 15 Ves. 258, 264.
(4) [1902] 1 Ch. 727.

judge below came to the conclusion that the covenant on its true construction did not restrain the underletting of a part only of the premises, and he further found that there had been an underletting of a part only, and therefore that there was no breach, such as would entail a forfeiture. The question is, what is the proper construction to be put upon the covenant in the events which have happened? It has no doubt been laid down that these covenants against alienation ought to be construed strictly, and I will assume that a covenant such as this does not work a forfeiture when there has been an assignment, underletting, or parting with the possession of a part of the premises only. The learned judge below founded his conclusion largely upon the condition requiring an assignee personally to enter into covenants with the lessor direct, and he has treated that as if it gave to the lessor the right to impose that condition in the case of an underletting. I cannot agree with him upon the construction of that part of the agreement. I think the agreement means what it says, and that it imposes upon an assignee alone the obligation to enter into an express agreement with the lessor if insisted on by him. It would be unreasonable, I think, to compel a lessee to require this condition to be fulfilled by a sub-lessee.

On the construction of the agreement I will, as I have said, assume that the covenant does not extend to an underletting of part only of the premises; the question then is, has the covenant so construed been broken? It seems to me that it has. The tenant has underlet the whole of the premises without the landlord's consent. It is true that she did it by separate steps. But the ultimate result is that she has underlet the whole without consent. She obtained consent to the sub-letting of a part, but not to the sub-letting of the whole. No authority has been referred to which prevents our giving to such a covenant as this the effect which, to my mind, upon the only reasonable construction, should be given to it. The object of the covenant clearly was that the whole of the premises should not be parted with without the landlord's consent; he has not consented, and I think there has

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been a breach of the covenant, and the lessor is entitled to say there is a forfeiture. It has been suggested that on the frame of the action the plaintiff cannot obtain consequential relief because the persons in possession of the premises are not parties to the proceedings. It seems to me that the answer to that is that the plaintiff is claiming not only possession but also mesne profits. There is therefore sufficient justification for the Court to make a declaration. The appeal must be allowed and a declaration made in the terms asked for.

YOUNGER L.J. I am of the same opinion. It is said that there has been no breach of the covenant, because on the occasion of the first sub-letting the defendant asked for and obtained the plaintiff's consent, the effect of which was that thereafter, she, the defendant, had nothing but a part of the premises to sub-let, and as the covenant did not restrain her from sub-letting a part of the premises without consent, there could not be a breach of the covenant. The defendant has now in fact sub-let the whole of the premises. She has underlet part of them by one agreement, and the residue by another. Counsel contends there is no breach, because at no one time has the defendant sub-let the whole without consent. It seems to me that that is not a reasonable construction of the covenant. It may be that on the occasion of the first sub-letting the lessor's consent was not necessary; but, in my view, the fact that consent to the first sub-letting was not necessary does not affect a subsequent sub-letting so as to make a further consent unnecessary. The covenant contemplates that if the whole of the premises are sub-let, and the consent of the lessor has not been obtained thereto, then there has been a breach. What has been done is contrary to the whole object of the covenant. If we were to hold otherwise, it seems to me that in a similar case the tenant could sub-let a small and immaterial part of the premises to a desirable sub-tenant, and then he might, without the lessor's consent, sub-let the larger and really material part to a highly

undesirable tenant, without incurring any risk of a forfeiture. I think the plaintiff is entitled to the relief for which he asks.

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EVE J. I agree.

Appeal allowed.

Solicitors: *Douglas W. Money; C. E. Vaughan Williams.*

G. A. S.

In re UNION NATIONALE INTER-SYNDICALE DES MARQUES COLLECTIVES' APPLICATION.

In re BASS, RATCLIFF AND GRETTON, LIMITED'S, OPPOSITION.

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[1921. B. 3868.]

Trade Mark—Special Application under s. 62 *of Trade Marks Act,* 1905, *to register "Unis, France"—"Undertakes to certify"—"Certify by mark"—Grounds of Opposition available before Registrar—Amendment of s.* 62 *while Application pending—"Right or privilege"—Saving Clause in s.* 38, *sub-s.* 2 (*c*), *of Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63)—*Trade Marks Act,* 1905 (5 *Edw.* 7, *c.* 15), *s.* 62—*Trade Marks Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 79), *s.* 12, *Sch. II.—Trade Marks Rules,* 1920, *rr.* 36–40.

By s. 62 of the Trade Marks Act, 1905, as amended by s. 12 and Sch. II. to the Trade Marks Act, 1919, "Where any association or person undertakes to certify the origin, material, mode of manufacture, quality, accuracy or other characteristic of any goods by mark used upon or in connection with such goods, the Board of Trade, if and so long as they are satisfied that such association or person is competent to certify as aforesaid, may, if they shall judge it to be to the public advantage, permit such association or person to register such mark as a trade mark in respect of such goods, whether or not such association or person be a trading association or trader or possessed of a goodwill in connection with such certifying":—

Held, by Peterson J., that the amendment of s. 62 of the Trade Marks Act, 1905, by the Trade Marks Act, 1919, which came into operation on April 1, 1920, applied to applications commenced but not resulting in registration before that date, and as from that date the only powers which the Board of Trade possessed were those conferred by the later Act. The unamended section merely conferred on the Board of Trade discretionary powers without imposing any obligation on them

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to permit registration; it did not confer any right or privilege upon intending applicants which came within the meaning of the saving clause contained in s. 38 of the Interpretation Act, 1889.

In re Hudson's Trade Marks (1886) 32 Ch. D. 311; 3 R. P. C. 155 distinguished.

A French Association made an application to the Board of Trade for registration of the words "Unis" and "Unis, France," in borders of various shapes as special trade marks for certifying French origin. The Association was a union of French syndicates the object of which was to introduce and regulate the use of certain marks, so that they should denote that the goods in connection with which they were used were made in France by manufacturers within the definition laid down by its regulations. The constituent syndicates could grant permission to use the mark, but only to persons who agreed to abide by the rules and only for use on French goods as defined. The marks had been in use in France and elsewhere for several years. The Board of Trade made an ex-parte order allowing the application to proceed. Notice of opposition was given before the Registrar by a number of British firms upon the grounds (inter alia) (1.) that the Association did not undertake to certify the origin of goods by mark; (2.) that the Association was not competent to certify; (3.) that the registration would not be for the public advantage. The Registrar of Trade Marks disallowed the objections. On appeal:—

Held, by Peterson J. and the Court of Appeal, that the questions raised by the objections (2.) and (3.) above were expressly reserved by the statute for the decision of the Board of Trade and could not be raised before the Registrar or the Court in any proceedings, but that in regard to objection (1.) the Board of Trade had no power to permit registration unless the applicants did undertake to certify by mark, and that in appropriate proceedings any decision of the Board of Trade on this point could be called in question.

Held, by the Court of Appeal, differing on this point from Peterson J., that the last-mentioned objection could be taken by an opponent in an opposition before the Registrar under rr. 36–40 of the Trade Marks Rules, 1920.

Held, by the Court of Appeal, that an association could certify by mark, although the mark itself did not indicate what characteristic was certified, and that in this case the applicants did undertake to certify by mark, and that as none of the objections raised by the appellants were established the appeal must be dismissed.

THE following statement of the facts is taken from Peterson J.'s considered judgment:—

"This is an appeal under s. 14 of the Trade Marks Act, 1905, as amended by s. 8 of the Act of 1919, from a decision of the Registrar by which he disallowed the objections of the appellants to the application of the Union Nationale Inter-Syndicale des Marques Collectives

for registration in this country of certain marks. The applicants are a French association which possesses various marks consisting of the words 'Unis, France,' enclosed in figures of varying shapes and, in one case, of the word 'Unis' alone. The word 'Unis' represents the initial letters of the words 'Union Nationale Inter-Syndicale.' The applicants do not trade or manufacture, and the marks in question are not applied, nor are they intended to be applied, to goods of the applicants. These marks are Inter-Syndical marks to show that the goods to which they are attached are of French production. They have been extensively used for many years past, and in May, 1917, application was made for their registration under s. 62 of the Trade Marks Act, 1905."

"The applicant Association was constituted in France by 'Statutes.' Art. 1 of these Statutes provides 'an association to be known under the name of the "Union Nationale Inter-Syndicale des Marques Collectives" is hereby formed between the syndicates adhering to these articles.' The Association is thus a union or association of French syndicates. Under art. 2 the objects of the Association are to create and protect Inter-Syndical marks, which are particularly intended to guarantee French products, to frame general rules governing the conditions under which such Inter-Syndical marks may be used, to grant licences for the use of such marks, to check the use of such marks, and to detect and proceed against their misuse and infringement. Art. 3 provides that all syndicates which desire to confer upon their members the benefit of any of the Association marks may be admitted as members if they adopt the special regulations which are in accordance with the Association's General Regulations. Art. 4 contains provisions for the constitution of the 'Comité Supérieur de la Marque Inter-Syndicale.' This committee consists of delegates elected by the syndicates which have joined the Association from such of their members as have authority to use the Inter-Syndical marks, and the voting power of each delegate is determined by the number of members of

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the syndicate represented by him who hold licences for the use of the Inter-Syndical marks. Art. 6 contains power for the creation of a board of directors consisting of twelve members elected by the Superior Committee and two delegates from each local committee. The board of directors is bound to carry out the decision of the Superior Committee, and to cause the marks to be registered in France and abroad; to superintend the use made of the marks, and decide what proceedings are to be taken in connection with the marks, and is authorised to determine questions between an adherent syndicate and members of the syndicate who are licensed to use the Inter-Syndical marks (art. 9). Art. 11 provides for the formation of local committees composed of delegates of the syndicates of the district which are members of the Association. The duty of a local committee is to consider questions which particularly concern its own locality and to keep a watch on the use of the Inter-Syndical marks in its district (art. 13). Art. 18 provides for the expulsion by the Superior Committee of any adherent syndicate which shall not comply with the general regulations governing the use of Inter-Syndical marks or the articles of the Association or any other regulations lawfully imposed by the Association; and thereupon the group of members so excluded shall be particularly prohibited from making use of the Inter-Syndical marks. One of the essential features of the statute is that the government or control of the Association is vested in the representatives of the industrial syndicates which are members of the Association."

"In accordance with the provision of the statutes the Association has framed 'general rules' concerning the use of the Union Nationale Inter-Syndicale marks. The object of these marks is to certify the French origin of the goods to which they are affixed (art. 1). If a syndicate desires to procure for its members the benefit of the marks it must adopt special regulations called the Règlement Syndical d'Emploi des Marques Collectives in accordance with a form prepared by the Association (art. 3). A draft of these special regulations and a copy of the resolution appointing a

delegate must be forwarded to the President of the Association by any syndicate which applies to become a member of the Association (art. 4). When a syndicate has been admitted as a member of the Association it may authorise manufacturers, whether they be or be not members of the syndicate, to use the ' Unis ' marks ; but no manufacturer is to be authorised to use the marks who is not a French manufacturer established in France, who has adopted the Syndical Regulations of a syndicate of his industry (art. 8). Except in special cases no manufacturer of foreign origin is allowed to use the marks until he has been a naturalised Frenchman for fifteen years. There is also in this article a general prohibition against the use of marks in connection with materials which have not been grown or manufactured in France or in French colonies and protectorates, and the application of the marks to distinctive goods is also forbidden. The marks thus indicate that the goods to which they are attached are the product of manufacturers established in France who are French by origin or naturalised Frenchmen of more than fifteen years' standing and have adopted the Syndical Regulations of a syndicate of their industry and have been licensed to use the marks by a syndicate which is a member of the Association; and generally, but not necessarily, they indicate that the materials from which goods have been made have been produced in France or in French possessions (art. 8 (3.))."

"Art. 9 provides for the identification of the person who uses the marks. Every syndicate is bound to send to the Association each year a list of its members who are authorised to use the marks together with a statement of the nature of the industry (art. 11). Arts. 13, 14 and 15 deal with expulsion. Whenever the Association learns of a breach of its regulations or of the special regulations of a syndicate, the Board is bound to inform the syndicate, and the syndicate is thereupon bound to put a stop to the breach in question ; but if the Board fails to obtain satisfaction it may propose to the Superior Committee to expel the syndicate. After notice of expulsion users of the marks who belong to the excluded syndicate must cease to use the Inter-Syndical marks

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(art. 15). Art. 16 provides for the prevention by the Association of the fraudulent use of any of the marks."

"A form of Syndical Regulations concerning the use of 'Collective' marks (Règlement Syndical d'Emploi des Marques Collectives) which must be adopted by the syndicates desiring to be admitted as members of the Association contains some provisions to which I ought to refer. Art. 1 confers upon a syndicate, which has been admitted as a member of the Association, the power to grant to its members the benefit of using the marks which are particularly intended to identify genuine French goods, but the syndicate is left free to decide whether it will grant this right to its members (art. 2). Art. 3 provides that the only manufacturers who may be authorised to use the marks are those who satisfy the conditions of art. 8 of the General Regulations of the Association, and that the marks must not be affixed to defective goods. Applications for admission must be supported by documentary evidence that the applicant satisfies the conditions of art. 3, which embodies art. 8 of the General Regulations (art. 5). By art. 6 it is declared that the syndicate alone shall have the right to grant authority to use the marks, and its decision on this point shall be absolute. Every breach of the Regulations shall be submitted to a jury, who may order the offending member's name to be struck off the register and recommend that he be expelled from the syndicate; but at the request of the offender or of the jury the question may be referred to the Board of the Association, whose decision is final (art. 13). Any person authorised to use the marks who notices the fraudulent use of any of the marks is bound to inform the syndicate, which in its turn is bound to notify the Association, and thereupon art. 16 of the General Regulations is to be applied (art. 16)."

"The result of these various documents may be summarised in this way: The Association is a body composed of industrial syndicates which have been admitted members and governed by representatives of those syndicates. It is the owner of certain Inter-Syndical marks which are designed to

certify that the goods to which they are applied are genuine French products; and one of the duties of the Association is to protect those marks from abuse. The syndicates which have been admitted members alone have a power to authorise the use of the marks by persons who come into the class of persons to whom such authority can properly be given, and before granting any such authority it is the duty of the Syndicate to ascertain that the applicant is a person to whom the authority may properly be granted. The governing idea is that the syndicate of a particular trade and its members have an intimate knowledge of their trade and of the persons employed in it, and that they are the persons best qualified to ensure that the right to use the marks shall only be granted in proper cases, and most interested in protecting the marks from abuse or fraudulent practices."

"The Association being desirous of registering its marks under s. 62 of the Trade Marks Act, 1905, applied in May, 1917, to the Registrar in accordance with r. 42 of the Rules of 1906. The Registrar made his report to the Board of Trade in July, 1917, in pursuance of r. 44, and expressed in it his opinion that, when the Association had fulfilled the requirements of r. 44 and satisfied the Board of Trade that there was some kind of supervision in the use of the mark, there was no reason why the applications, with one possible exception, should not proceed. In August, 1917, the Association sent to the Board of Trade a case setting out the grounds on which it relied in support of its application, and dealing specifically with the question of supervision. On April 22, 1918, the Board of Trade ordered that the application be permitted to proceed subject to four conditions, one of which reserved to the Board of Trade power to cancel the marks when registered at any time. This order was made under r. 45. The Board of Trade before making the order do not appear to have availed themselves of the power under r. 45 to call for evidence or to hear the applicant or the Registrar. The marks were then advertised in accordance with r. 46, and the advertisement elicited the present opposition in September, 1918; and after a counter-statement

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and evidence had been filed, the case came on for hearing before the Registrar, who in March and May of 1921 decided against the opponent's objections. While this application was pending the Trade Marks Act of 1919 was passed, and on April 1, 1920, it became operative. One of the questions which was discussed before the Registrar was whether the Act of 1905 (1) or the Act of 1919 (2) was applicable to the circumstances of this case. As I understand, the learned Registrar held that the question under s. 62 of the Act of 1905, whether the applicants were an association which undertakes the examination of goods in respect of origin and certifies the result of such examination by mark, was not raised by the notice of opposition, and that he was precluded by s. 14, sub-s. 8, from allowing the point to be taken. The grounds of objection do not, it is true, specifically raise this question, but I think that both the first and second grounds of objection were directed to the provisions of s. 62. The counter-statement by para. 1 specifically asserted that the applicants were an association within the meaning of s. 62,

(1) Sect. 62 of the Trade Marks Act, 1905, provided: "*Where any association or person undertakes the examination of any goods in respect of origin, material, mode of manufacture, quality, accuracy, or other characteristic, and certifies the result of such examination by mark used upon or in connection with such goods, the Board of Trade may, if they shall judge it to be to the public advantage, permit such association or person to register such mark as a trade mark in respect of such goods, whether or not such association or person be a trading association or trader or possessed of a goodwill in connection with such examination and certifying.* When so registered such trade mark shall be deemed in all respects to be a registered trade mark, and such association or person to be the proprietor thereof, save that such trade mark shall be transmissible or assignable only by permission of the Board of Trade."

(2) By the joint operation of s. 12 and the Second Schedule of the Trade Marks Act, 1919, for the words printed in italics in the preceding note the following words are substituted: "Where any association or person undertakes to certify the origin, material, mode of manufacture, quality, accuracy or other characteristic of any goods by mark used upon or in connection with such goods, the Board of Trade, if and so long as they are satisfied that such association or person is competent to certify as aforesaid, may, if they shall judge it to be to the public advantage, permit such association or person to register such mark as a trade mark in respect of such goods, whether or not such association or person be a trading association or trader or possessed of a goodwill in connection with such certifying."

while para. 6 alleged that the General Syndical Regulations ensured that the marks afforded an absolute guarantee that the goods to which they applied were of French origin. The point was specifically raised by para. 10 of Mr. Hamilton's statutory declaration, and dealt with by para. 30 of M. Legonez' declaration in answer, and by para. 14 of Mr. Hamilton's declaration in reply. In those circumstances I allowed such formal amendment as might be necessary for the purpose of raising the question. The learned Registrar having expressed the view that the application was governed by s. 62 as amended by the Act of 1919, was asked to allow the opponents to amend the grounds of objection by raising the questions under the amended section, (1.) whether the Association undertakes to certify the origin of any goods by marks used upon or in connection with such goods, and (2.) whether the Association is competent to certify as aforesaid. This amendment the Registrar did not allow, presumably because in this case too he felt himself hampered by s. 14, sub-s. 8, of the Act of 1905. But where, after the grounds of objection have been delivered, an Act comes into operation which opens up the possibility of other objections, it is only fair that the opponents shall have an opportunity of availing themselves of any objections which the new Act has made possible; and I accordingly permitted such amendments as were requisite for the purpose of raising the questions which originated from the amended section."

The appeal from the decision of the Registrar of Trade Marks came on for hearing before Peterson J. on December 7, 8, 9, 13, 14 and 15, 1921.

The numerous objections taken by the opponents sufficiently appear in the following considered judgment.

Sir John Simon K.C., *Maugham K.C.* and *Sebastian* for the appellants, the opponents.

Sir Duncan Kerly K.C. and *F. E. Bray* for the respondents, the applicants.

Dighton Pollock for the Board of Trade.

Cur. adv. vult.

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1922. Jan. 25. PETERSON J. stated the facts as above set out, and continued: The first point to be disposed of is the question whether the application is governed by the original s. 62, or by that section as amended by the Act of 1919. If power to allow registration of the marks depends upon the provisions of the Act of 1919, it is not necessary to consider any of the questions which arise in connection with s. 62 of the Act of 1905. When the present application was made it was necessarily made under the original s. 62. The question is whether that section was applicable when the amended section was substituted for it. Reliance was placed on s. 38, sub-s. 2, of the Interpretation Act, 1889. That sub-section provides that where an Act repeals another enactment, then unless the contrary appears the repeal shall not affect (*c*) any right, privilege, obligation, or liability acquired, accrued, or incurred under the repealed enactment, or (*e*) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, or obligation as aforesaid, and that any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced as if the repealing Act had not been passed. The investigation or legal proceeding, the continuation of which is authorized, must be one in respect of any right or privilege acquired or accrued under the repealed enactment. But what is the right or privilege which had accrued to, or been acquired by, the applicants under the original section? That section merely enabled the Board of Trade, if the applicants fulfilled certain conditions, to allow them to register their marks. The section did not impose any obligation upon the Board of Trade in any circumstances to permit the registration. The applicants never had a right to have the marks registered. Whether the marks would or would not be registered depended upon the volition of the Board of Trade, even if the applicants were an association of the kind described by the section. Until the marks had been registered, the only thing which the applicants acquired under the section was, I think, at most, permission to apply to the Board of Trade to exercise in their favour the powers conferred by the section upon the Board. In my opinion

this could not be described as a right or privilege which had accrued to, or been acquired by the applicants within the true meaning of s. 38 of the Interpretation Act, 1889. If it were it would be a right or privilege on which they could insist, although no application had been made before the amended section had become operative. But such a view would render the substituted section inapplicable to any association or person that was in existence before the date on which the substituted section became operative and was then of the description referred to in the original section. In my judgment the substituted section applies to the case of any application commenced before April 1, 1920, which has not before that date resulted in registration. The new section is substituted for the original section as from April 1, 1920. The Board of Trade have certain powers of permission ; but as from April 1, 1920, the only powers which they possess are those conferred by the Act of 1919. If an application had been made under the original section on March 31, 1920, it would, I think, have been impossible for the Board of Trade on April 2, 1920, to grant permission under a section which had been repealed from April 1. These sections confer upon the Board of Trade a discretionary power to allow persons or associations with certain qualifications to register marks which, apart from the provisions of the sections, could not be registered. They do not confer any rights. They are authorities to the Board of Trade in certain circumstances to grant the privilege of registration. In my opinion, the discretion or authority conferred upon the Board of Trade by the original section came to an end on March 31, 1920, and the Board could not, after that date, permit an association to register a special trade mark unless they were satisfied that the association fulfilled the requirements of the section which then governed their right and power to grant permission.

It is not without importance to observe that s. 6, sub-s. 1, of the Act of 1919 affected the existing rights, and that, while s. 8, which abolishes the right of appeal to the Board of Trade under s. 14, provides that nothing in the section shall affect any appeal to the Board of Trade which may be

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pending at the commencement of the Act, there is no provision which prevents the new s. 62 from operating on applications under s. 62 of the Act of 1905 which are pending on April 1, 1920.

In re Hudson's Trade Marks (1) is, in my view, plainly distinguishable from the present case. The Court of Appeal dealt with that case on the basis that as the application was made before the Patents Designs and Trade Marks Act of 1883 came into operation the Act of 1875 was applicable. But this view was due to a section in the Act of 1883 which provided that the repeal of the Act of 1875 should not affect any application made before the Act of 1883 came into force. For these reasons I am of opinion that the only authority to permit the registration of these marks is that which is conferred by the Act of 1919, and it is therefore unnecessary for me to consider the various questions which have been raised in connection with the provisions of the original s. 62.

I must, however, deal with the questions which the opponents have raised in connection with s. 62 as amended by the Act of 1919. Their objections are, first, that the Association does not undertake to certify the origin of any goods by mark used upon or in connection with such goods; secondly, the Association is not competent to certify as aforesaid; thirdly, the Board of Trade have not, by their order directing the application to proceed, adjudged the registration of the mark to be for the public advantage; fourthly, if the Board of Trade have so adjudged, their decision being ex parte is bad; and, fifthly, the registration of these marks is not for the public advantage. The question at once arises, which, if any, of these objections can be entertained either by the Registrar or on appeal from him by the Court? A perusal of the amended section shows that the Legislature reserved to the Board of Trade the determination of the questions whether the Association is competent to certify, and whether registration of the marks will be for the public advantage. The power to grant permission to register is conferred upon the Board of Trade, and the exercise of that power is made

(1) 32 Ch. D. 311; 3 R. P. C. 155.

subject to three conditions—first, that there must be an association or person who undertakes to certify the origin of the goods by mark; secondly, the Board of Trade must be satisfied that such an association or person is competent to certify; and thirdly, the Board of Trade must judge it to be to the public advantage that such a registration should be permitted. Under this section it is for the Board of Trade, and for no other person or tribunal, to come to the conclusion whether the association is competent to certify, and whether the registration of the mark is for the public advantage. The power to permit registration can only be exercised by the Board of Trade if they are satisfied as to the competency of the association to certify, and if they consider registration to be for the public advantage. If the conclusions as to competency and as to the public advantage were reached by some person or tribunal other than the Board of Trade two of the conditions on which the power of the Board of Trade to grant permission to register depend would not be fulfilled. In my opinion, then, it is not, under the section, open to the Registrar or to the Court to determine whether the Association is competent to certify or whether the registration is for the public advantage. The only authority which under the section is competent to determine these questions is the Board of Trade. A comparison of the Acts of 1905 and of 1919 shows that while the Board of Trade are by s. 8 of the Act of 1919 relieved of the burden of appeals from the Registrar under s. 14 of the Act of 1905, the duties of the Board of Trade in the case of special trade marks under s. 62 are more clearly specified and defined by the Act of 1919.

It was argued that the power of the Board of Trade under s. 62 is similar to that conferred upon it by s. 9, sub-s. 4, of the Act of 1905, and that as the effect of an order under s. 9, sub-s. 2, is merely an authority to proceed with the application on the basis that the mark is a distinctive mark (*In re Joseph Crosfield & Sons, Ld.* (1)), so under s. 62 the function of the Board of Trade is confined to a power to hold that the mark in question is the mark of an association which

(1) [1910] 1 Ch. 118, 130; 26 R. P. C. 561, 837.

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prima facie fulfils the requirements of s. 62. But I am not able to accept this view. The provisions of s. 62 in my opinion expressly throw upon the Board of Trade the duty of determining whether the Association is competent to certify and whether registration of the mark will be to the public advantage. It is moreover to be observed that under s. 62 the power is to permit registration if and so long as the Board of Trade are satisfied that the Association is competent to certify. Whether these words show that even after registration has been permitted the Board of Trade can refuse to allow the mark to continue on the register if in their opinion the Association is no longer competent to certify is open to argument. But I think that these words at least confer upon the Board, if they are no longer satisfied that the Association is competent to certify, the power to cancel a permission which they have given if the mark has not actually been registered. Such a provision appears to me to be inconsistent with the contention that the ultimate power to permit registration does not rest with the Board of Trade. I observe that under s. 58 of the 1905 Act all things required or authorized to be done by the Board of Trade may be done by the President or Secretary of the Board or any person authorized in that behalf by the President of the Board. But in the argument before me no reliance was placed upon this section, and indeed there is nothing to indicate that the President of the Board of Trade ever purported to authorize the Registrar or the Court to determine the questions which by s. 62 are reserved for the consideration of the Board of Trade. By s. 60 of the Act of 1905 the Board of Trade are enabled, subject to the provisions of the Act, to make such rules as they think expedient for regulating the practices under the Act, and sub-s. 2 enacts that rules made under this section shall whilst in force be of the same effect as if they were contained in the Act. The Board of Trade in 1906 made rules of which those numbered 42 to 46 inclusive relate to special trade marks under s. 62. Those rules are reproduced in rr. 36 to 40 inclusive of the rules issued in 1920. Under those rules application is made to the Registrar on a special

form which states that the applicant desires the Board of Trade to permit registration of the mark in question. On receipt of the application the Registrar informs the Board of Trade of it and makes a report to the Board of Trade upon the application. A copy of this report is sent to the applicant, who then sends to the Board of Trade a case setting out the grounds upon which he relies in support of his application. On receipt of this case the Board of Trade may call for such evidence, if any, as they think fit, and shall, if necessary, hear the applicant and the Registrar and make an order determining whether and subject to what conditions, amendments and modifications or limitations, if any, the application may be permitted to proceed. "If such application is permitted to proceed the mark shall be advertised and the application shall be treated in all respects as if it were an ordinary application, and it shall be open to opposition in the same way and all such proceedings shall be had therein as if it were an application under s. 12 of the Trade Marks Act of 1905" (r. 40).

The applications in the present case were dealt with in accordance with those rules, and by their order of April 22, 1918, the Board of Trade, after considering the applications and the applicant's case, determined that the application should be permitted to proceed subject to certain conditions. The applications thus become open to opposition before the Registrar. But what objections or grounds of opposition can be urged before the Registrar under these rules? While the rules might easily be clearer and more precise, I do not find it possible to suppose that they leave open for determination by the Registrar matters which are reserved by the Act for the consideration and decision of the Board of Trade. The power to make rules is subject to the provisions of s. 60 of the Act. Under r. 40 the application is to be treated in all respects as if it were an ordinary application; that is to say, as if it were an application under s. 12, and it is open to opposition in the same way as if it were an application under s. 12. In my opinion the opposition before the Registrar cannot be directed to questions which are by the Act reserved for the decision of

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the Board of Trade, but is confined to the kind of objections which are maintainable in the case of applications under s. 12; for example, objections arising under ss. 9 and 11. Where the Board of Trade, after considering the applications and the applicant's case, determine that the application may be permitted to proceed, they determine, at least provisionally, that the applicant is an association which comes within the provisions of s. 62. That decision is not necessarily final. It may be cancelled by the Board of Trade if convincing representations be made to the Board by opponents. These considerations, I think, dispose of the complaint that the Board of Trade have acted ex parte without hearing the opponents. It is open to the opponents at any time to lay before the Board of Trade their objections to the exercise by the Board of their powers under s. 62.

There still remains the objection that the applicants in this case do not undertake to certify the origin of any goods by mark used upon them in connection with such goods. It is truly said that the section does not leave to the determination of the Board of Trade the question whether the applicants do undertake to certify the origin of goods by mark. The powers of the Board of Trade under the section are only exercisable in cases in which the applicants comply with this condition precedent. But when an application is made under s. 62, the Board of Trade must, before they consider whether the applicant is competent to certify, or whether registration of the trade mark will be to the public advantage, investigate the question whether the applicant is an association or person of the kind described in the opening portion of the section. It is conceivable that the Board might come to an erroneous conclusion on this question, and consider that an association undertakes to certify when in fact it does not. This would be a case in which the Board exceeded their statutory powers by giving permission to register a mark to a person who does not fulfil the requirements of the first part of the section, and in a proper case the Board could be prevented from exceeding the powers which the statute has conferred upon them. But while there may be a remedy in such a case against the Board of

Trade, I do not see any ground for saying that the Registrar had any authority to determine that the Board of Trade have exceeded, or proposes to exceed, their statutory powers, or to decide whether this is a case in which the Board of Trade have jurisdiction to exercise the powers conferred upon them, and the Court on appeal from the Registrar's decision on the opponent's objection has no greater authority. This question, however, does not appear to me to have arisen at present. The Board of Trade no doubt have considered the applications with reference to the unamended s. 62, and if that section had remained in its original form, and the Board of Trade's view that the applicants undertook the examination of goods in respect of origin and certified the result of such examination by mark used upon or in connection with such goods, was untenable, it might be possible by appropriate proceedings to prevent the Board of Trade from permitting the marks to be registered. But by the Act of 1919 a new section has been substituted for the original s. 62, and instead of considering whether the applicants undertake to examine goods in respect of origin and to certify the result of such examination by mark used upon or in connection with such goods, the Board of Trade have now to consider whether the applicants undertake to certify the origin of goods by mark used upon or in connection with the goods and whether they are competent to certify as aforesaid. The Board of Trade can only permit the registration of the mark so long as they are satisfied that the applicants are competent to certify the origin of goods by mark used upon or in connection with such goods. While the Board of Trade have considered the question of permitting registration under the original s. 62, they have not considered the question from the point of view of the amended section, and have not come to the conclusion that the applicants undertake to certify the origin of any goods by mark used upon or in connection with such goods, or that the applicants are competent to certify as aforesaid. Until the Board of Trade have come to a conclusion on this question, it is impossible to say that they have come to a wrong view on the section, or that they have exceeded the statutory powers

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conferred upon them by the amended s. 62. In my view, however, before these marks are registered, the Board of Trade ought to consider whether, having regard to the provisions of the amended section, permission should be given, and any application by the opponents to be allowed an opportunity of laying before the Board of Trade their objections to the jurisdiction of the Board to grant permission for registration in the present case will no doubt receive proper consideration.

The objections with which I have dealt are those on which most stress was laid in the argument before me. The notice of opposition, however, contained other grounds of objection to which I will briefly refer. (1.) The first objection was that the registration of marks would be injurious to the interests of British manufacturers, traders and consumers, and contrary to the public advantage. The question whether the registration of the marks will be to the public advantage is one for the consideration of the Board of Trade, and not for the Registrar, or for the Court on appeal from the Registrar. (2.) The second objection that the marks will not afford any guarantee that the goods are of French origin, appears to be directed to the provisions in the original s. 62, in connection with the examination and certification of the result of examination. Under the new section, registration may be permitted if the applicants undertake to certify origin by mark, and the Board of Trade are satisfied that they are competent to certify, and the registration is for the public advantage. These are questions which in my opinion must be dealt with by the Board of Trade. (3.) The third objection that the marks are intended to represent, and will represent, that goods which do not bear them are not goods of French origin, does not appear to me to have any substance in it. The marks hitherto not registered do not represent anything of the kind, and I see no ground for thinking that when registered they will have any such significance. The marks represent that the goods to which they are affixed are goods made in France by Frenchmen, or persons who have been naturalised Frenchmen for over fifteen years. A statement of this kind plainly does not represent that

any goods which do not bear the marks have not been made in France. (4.) It is said that the marks will discriminate unfairly between the goods of the firms which associate themselves with the applicants and the goods of firms which prefer not to do so. The hypothesis appears to be that the right to use the marks is a benefit, that some firms will decline to prefer the benefit, and that there is some unfairness in allowing associated firms to use the marks when other firms do not choose to avail themselves of the opportunity of using them. I am unable to follow this argument. It would apparently apply to any collective marks so long as any person who might if he chose become entitled to use the mark refused to avail himself of his opportunity. (5.) and (6.) The fifth objection is that marks would tend to restrict British traders instead of the French firms from whom they obtained their supplies, while the sixth is that the marks will tend to mislead British consumers and lead them to prefer the goods of one firm to those of another for insufficient and mistaken reasons. These objections are based upon the prophecy that the French firms who use the marks will represent that the goods not bearing them are not of French origin, and that British consumers will believe these representations and insist upon getting goods which bear these marks. The marks have been in use for some years, and the prophecy appears up to the present time to be unfulfilled. I have no ground for supposing that the French firms in question will be so dishonest, or their competitors so helpless, or the British consumer so simple as the opponents anticipate. But in any case the fifth objection appears to be a contention that registration of the marks will not be for the public advantage, and this is a matter for the consideration of the Board of Trade. (7.) The seventh objection is based upon the same grounds as the fifth and sixth, and is exposed to a similar answer. (8.) It is objected that the marks, while they purport to be, would not in fact be, Nationale Inter-Syndicale marks, but marks indicating only that the firms using them had joined the applicants. I gather from Mr. Hamilton's statutory declaration that the phrase "National mark" means

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a mark universally applied to the goods ordered in a particular country. If this is what is meant by the use of the phrase in the objection, the marks do not purport to be national marks nor do the marks merely indicate that the firms using them had joined the applicants. They indicate that the goods to which they are applied have been made by French manufacturers established in France, or manufacturers of foreign origin naturalised in France for more than fifteen years, who have adopted the syndical regulations of a syndicate of their industry, and have been licensed to use the marks by a syndicate which is a member of the applicants' Association. (9.) This is an objection that some small articles cannot be marked, and that cards bearing the mark might be hung up in shops over goods which are not of French origin : see Mr. Hamilton's statutory declaration, para. 16. It is always possible that a trade mark may be fraudulently used by some dishonest competitor ; but that does not appear to me to be a reason for refusing to register it. (10.) The meaning of the tenth objection is expounded in para. 17 of Mr. Hamilton's statutory declaration. It appears to me to be an argument that it is not to the public advantage that the marks should be recognized. If this is so it is a contention which should be addressed to the Board of Trade. (11.) This is an objection that the more the marks become marks of quality the less will they be marks of origin. The meaning of this objection is explained in para. 18 of Mr. Hamilton's statutory declaration, the contention being that the marks will tend to become marks of quality and produce the belief that the goods bearing them are the best wherever they are produced. It is difficult to see how a person who purchases goods with the mark "Unis, France," on them, can suppose that they have been produced elsewhere than in France. If all the goods bearing that mark were of high quality, a purchaser might no doubt come to think that the goods bearing the mark were of high quality, but he would also know that the goods were produced in France. Moreover, if any serious objection arose it could, so far as registration is concerned, be dealt with under the power

which the Board of Trade have reserved to cancel the registration at any time. But it would seem that the objection in this case is to the use of the mark rather than to its registration. (12.) This is an objection that the use of the mark, whether registered or unregistered, would be injurious to trade marks in many of which British firms are interested. The point of this objection seems to be that the goods bearing the mark may acquire a reputation which would affect the sale of similar goods by firms having private trade marks. But this is an objection to any collective mark and does not seem to be consistent with the policy of s. 62. (13.) This apparently is an objection that in case of fraudulent use of the marks, British dealers and consumers would be prejudiced: see Mr. Hamilton's statutory declaration, para. 20. But no British authority could exercise any control over the use of the marks and no French or other authority could ensure that they were properly applied. The fact that there may be fraudulent imitations does not appear to me a reason for refusing registration. The allegation that no British authority could exercise any control over the use of the marks appears to be an objection to the registration of a mark of foreign ownership, but it was admitted that the section applies to foreign associations. Whether the Association exercises adequate control over the use of the mark is covered by the question whether it is competent to certify, and that question is one for the consideration of the Board of Trade under the amended s. 62. (14.) and (15.) These objections were abandoned. (16.) and (17.) These are objections that British manufacturers who have branch factories in France, or who carry on business in France without having been naturalised for more than fifteen years, are precluded from the use of the marks. These facts are not disputed. It may be said that this is a branch of the question whether the registration is for the public advantage. But whether the mark be or be not registered, the objection such as it is will remain; for the marks are, and have for some years been, in extensive use. The answer as it appears to me is that the British

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manufacturers in question can register a mark of their own, and that they have no solid ground of complaint because they are precluded from using a mark which is appropriated by an Association of which they are not qualified to be members. (18.) This is an objection that British manufacturers exporting to France partly manufactured goods and pieces or parts, may find their trade destroyed by the refusal of the marks to French goods. The objection is rather to the way in which the marks are used than to the registration of the marks which would be used in the prescribed manner whether registration is permitted or not. The objection is that the French manufacturers who wish to use the applicants' marks will not purchase materials which are not produced in France or in French possessions. But it would not seem to be a sufficient reason for refusing registration that the marks could only be affixed to goods wholly made out of materials produced in France, as that would be a method of certifying the origin, unless indeed the Board of Trade come to the conclusion that registration in those circumstances will not be to the public advantage. (19.) This objection was abandoned.

I am of opinion, therefore, that the opponents' objections ought to be disallowed in the present proceedings. I have abstained from considering the merits of any objections which the opponents may think proper to bring to the attention of the Board of Trade.

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The opponents appealed. The appeal was heard on May 16, 17, 1922.

Sir John Simon K.C., *Maugham K.C.* and *L. B. Sebastian* for the appellants. Peterson J. held that the case was governed by s. 62 of the Act of 1905 as amended by the Act of 1919, and the appellants are content that it should be so treated.

Under the section as so amended it is a condition precedent to an application to register a mark under it that the applicants should undertake to certify. The jurisdiction of the

Board of Trade does not arise until the applicants have fulfilled that condition. The Association is not within the section. Peterson J. in his judgment has nowhere said that the Association undertakes to certify.

The applicants here are the Association and not the syndicates. The Association does not undertake to certify if all it does is to authorize the syndicates to authorize traders to use the mark. Certification is announcing a conclusion which has been reached and that is a wholly different thing from authorizing other persons to announce their conclusion. The condition that a body should undertake to certify and should be competent to certify is a real protection to the public. The Association are nothing more than the proprietors of a mark which they propose to let out. To undertake to certify by mark is not the same thing as to regulate the use of a mark. To undertake is to accept the burden of doing a thing as distinguished from getting it done by others.

A second objection is that this mark is not intended to certify a characteristic of the goods. The regulations of the Association do not allow the mark to be used on goods made in France by British firms. Only selected manufacturers may use the mark. If the mark is intended to certify anything, it is a characteristic of the person who manufactures and not of the goods.

The Court has on appeal from the Registrar a right to decide whether the mark should be registered or not. The decisions under s. 9, para. 5, are material on this point. Where the Board of Trade have directed an application to proceed there is a right of appeal to the Court on the matter. It was said by the Registrar that the Board of Trade had decided the point finally. But a decision of the Board of Trade on an ex-parte application is not final: *In re Joseph Crosfield & Sons, Ld.* (1) It is submitted that an application to the Board of Trade under s. 62 is similar to an application to them under s. 9, para. 5, and that all that the Board of Trade ought to determine is whether there is a prima facie case: *In re R. J. Lea, Ld.'s Application.* (2) The procedure is laid

(1) [1910] 1 Ch. 118, 130. (2) [1913] 1 Ch. 446, 461.

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down by the Trade Marks Rules, 1920, rr. 36–40. There has been no more here than an adjudication ex parte that the application to register should proceed, but under s. 16 the Registrar must register this mark if the opposition be disallowed and the Board of Trade do not intervene. It is contrary to the intention of the Act that the mark should be registered when there has only been an ex-parte decision on the point which is contested. The opponents are therefore entitled to be heard on the question of public advantage.

The Association is not a body which undertakes to certify a characteristic of the goods. Primarily the use of the "Unis" mark indicates the nationality of the trader and only incidentally that the goods were made in France. The selective power conferred by the rules of the Association prevents the mark coming within s. 62.

The Association does not really certify anything. Certifying connotes assuring the public of the origin or other characteristic of the goods. The final words of s. 62 show that there must be something personal about the certificate and these are not satisfied by an association of persons who only license others and have themselves no active duties to perform.

[YOUNGER L.J. Is it possible to certify a characteristic of goods by mark, unless the mark itself shows what is the characteristic which it certifies ?]

The appellants submit that it is not, and that the mark does not show that it certifies origin.

Sir Duncan Kerly K.C. and *F. E. Bray* for the respondents. The mark need not be self-explanatory. A trade mark means nothing until it has acquired a meaning. It is not necessary to the validity of an ordinary trade mark that it should tell anything of itself, nor is this necessary for a special trade mark under s. 62. Sect. 62 may be conveniently read with a passage in the Washington International Convention set out in Kerly on Trade Marks, 4th ed., p. 823. The Convention shows the purpose in mind when s. 62 was amended.

The mark here means (1.) that the goods are French goods,

and (2.) that they are made in France by Frenchmen. How can it then be said that it is not a mark of origin ? Origin is not limited to mere geographical origin : it may include the persons from whom the goods come.

On none of the points raised by appellants is there an appeal to this Court.

Under s. 62 an application can be made to the Board of Trade to register as a trade mark that which is not in fact a trade mark on the hypothesis that it is one. Rule 40 requires the Registrar and the Court to act on the hypothesis that it is an ordinary application by a qualified trader. Sect. 62 gives no right of appeal. If this were an ordinary application no question could arise as to the personal qualifications of the applicants. What is said to be a fatal objection to the application is a matter for the Board of Trade to deal with and there is no right of appeal from their decision. The question is one of policy. The respondents are not here applying for a licence to use a mark, but for statutory powers to prevent the misuse of the mark. Registration will proscribe the persons who misuse the mark. Non-registration will not prevent the respondents using it. They have already used it for some years. It is contended that it is a condition precedent that the respondents should undertake to certify. If that is so, then that is a question for the Board of Trade and there is no appeal to the Court from their decision. The question is one to be dealt with by the Board of Trade and it is not until the Board of Trade say that the applicants are to be treated as if they were ordinary applicants that the jurisdiction of the Registrar arises. It is a question of administration, and the action of the Board of Trade cannot be questioned except by the ordinary means applicable in cases of misconduct by ministers.

The words "undertakes to certify" in s. 62 include : (1.) providing or adopting a mark capable of acquiring the appropriate meaning ; (2.) defining that meaning or defining the cases in which the mark may be properly used ; and (3.) acting or offering to act as guardian of the mark in order to prevent its misuse. The object of s. 62 is to give powers

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to the guardian of the mark. The Association in the present case does in fact undertake to certify. It is said that the Board of Trade have never decided that the Association undertakes to certify. If so why can they not do so now? The mark is not yet upon the register and cannot be placed upon it until the Board of Trade allow it to be so placed. When and so long as it is upon the register it will be under the control of the Board of Trade.

It was said that the characteristic to be certified must be something that was a characteristic of the goods ascertainable by inspection, but obviously the origin of goods cannot be ascertained from an inspection of the goods.

The characteristic feature of an ordinary application under s. 12 is that there is some person who claims to be proprietor of the trade mark. Under s. 62 the applicant does not claim to be a proprietor, because there is no goodwill. The forms laid down by the rules show that this distinction was appreciated, and therefore when r. 40 says that applications under s. 62 are to be treated in all respects as if they were applications under s. 12, it means that throughout the opposition proceedings, the tribunal must leave out of consideration any question which arises out of the special character of the applicant under s. 62. The applicant must be assumed to be a person as to whom no question of undertaking to certify is material. The last three lines of the rule relate to machinery: the earlier words "treated in all respects" relate to the grounds of opposition which are available. The contention of the appellants is that the rule gives the Registrar jurisdiction to allow an objection which he would not have jurisdiction to allow if the application were an ordinary one; but the words of the rule exclude such a contention. The rules are made under the Act and therefore must be construed consistently with the Act so as to be intra vires. Rule 40 would be ultra vires if it enabled the Registrar to overrule the Board of Trade.

The second question—namely, whether the Association undertakes to certify—is partly a question of fact and partly a question of law. Sect. 62 requires that there shall be a

mark which will assure the public that the goods are of a particular origin.

[YOUNGER L.J. One question is whether the public can be so assured unless the mark tells them what it is intended to represent.]

The section does not mean that the mark must be a certificate that all the world can understand. The only persons to be considered are those who understand the meaning of the mark and are consequently liable to deception if it is falsely applied. If the mark had to be self-explanatory it could only consist of words and no device could be self-explanatory. Sect. 62 should be read by substituting for the word "mark" the definition of "mark" in the definition clause in the Act, and, so read, it must include marks which are not self-explanatory.

The statutes of the Association reserve to the central committee the right to call for any documents to show whether the marks are being properly used and for the prosecution of persons who are using them improperly and for the expulsion of syndicates. The amendment to s. 62 introduced by the Act of 1919 does not merely dispense with physical examination; it cuts out all reference to examination of any description by the Association itself. As long as there is such investigation as is sufficient to make the mark an assurance in actual practice, it is no objection that the investigation is to a certain extent entrusted by the Association to the syndicates. The Association as a body cannot investigate or apply the mark itself. It acts through the users and the syndicates who are the agents through whom alone such an Association can act.

Dighton Pollock for the Comptroller-General. A mark may be anything. If a case of misuser arose there would be no difficulty in putting the matter right. The appellants might go to the Board of Trade who could take the mark away. The old s. 62 was more drastic in its terms than the present section. If the appellants apply to be heard before the Board of Trade their application will be considered.

Maugham K.C. in reply. Sect. 62 makes a distinction

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between matters which are administrative and matters which are not. It is not for the Board of Trade to determine whether the Association undertakes to certify. There is no ground for increasing the power of the Board and diminishing that of the public. The section cannot, as suggested by the respondents, be construed with reference to a convention entered into with a foreign country.

[LORD STERNDALE M.R. Was the point that the mark must be self-explanatory taken before the Registrar ?]

No. But it was argued that the mark here will come in some cases to be regarded as a mark of quality and not of origin. The jurisdiction under s. 14 is not confined to objections based on ss. 9 and 11. No Court has so decided : see Kerly on Trade Marks, 4th ed., pp. 76–78. Sect. 14, sub-s. 5, was amended by the Act of 1919, therefore if s. 14 is brought in by the rules, the Court is brought in as the appellate tribunal from the Registrar. Rule 40 provides that after an order is made by the Board of Trade the matter proceeds as on an ordinary application. That therefore brings in s. 14 and there is nothing therefore to prevent an opponent from taking the objection that the applicant is not a proper applicant. The practice under s. 62 is almost identical with that under s. 9, para. 5. The Registrar must therefore exercise his discretion as to whether the mark should be allowed and there is an appeal from his decision to the Court.

With regard to the meaning of the phrase " undertakes to certify " the respondents desire to alter the words of the Act and to read them as meaning " act as guardian of the mark." The respondents might well act as guardians of the mark without " undertaking to certify." " Competent " in the section means competent in the ordinary sense of the word, and the use of the word shows that the certificate contemplated by the section is one which involves investigation. As illustrating the meaning of the word " certify " *Farmer* v. *Legg* (1) shows that the phrase " certifying" indicates that the person certifying knows that the facts certified are true. The case is analogous to that in regard to anchors and chains under

(1) (1797) 7 T. R. 186.

62 & 63 Vict. c. 23, where licences to test are granted to various bodies and a certificate is given by the licensed tester. It is an abuse of language to say that the association which only licenses others is a body which undertakes to certify.

LORD STERNDALE M.R. This is an appeal from Peterson J., a learned judge whose recent death we so deeply deplore, both professionally and personally. It raises difficult questions of some importance under the Trade Marks Acts. Looking at the magnitude, the power and the wealth of the interests on each side, it is hardly to be supposed that the parties will be satisfied with a decision anything short of the highest tribunal: therefore I propose not to reserve judgment, but to put them in a position to go further as soon as possible, if they wish.

I think on the whole the appeal should be dismissed. There are several questions raised on this appeal, some of which in my opinion it is not necessary to decide, and which, therefore, I do not intend to decide. The case arose upon s. 62 of the Act of 1905 as amended by the Act of 1919. Sect. 62 of the Act of 1905 provided [His Lordship read the section and continued:] I think Sir Duncan Kerly is right in saying that this is one of those sections which says that something shall be deemed to be what it is not. The mark proposed for registration is not a trade mark. The section says that such a mark may be registered *as* a trade mark. That section requires examination of the goods by the person who wished to register the mark. By the Act of 1919 the section was amended so as to run as follows [His Lordship read the section as amended and continued:] One essential point to be considered is that the requirement of examination of the goods in the old section does not appear in the new one: and all that the new section requires is that the person who applies for registration shall be a person who undertakes to certify the specified or other characteristics of the goods. It also contains the provision that the Board of Trade may permit that mark to be registered if and so long as they are satisfied that such association or person is competent to certify as aforesaid.

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The learned judge was, in my opinion, quite right in saying that there were three conditions in the section which must be satisfied: first, that the association or person making the application undertakes to certify some characteristic in respect of the goods; secondly, that the Board of Trade must be satisfied that such association or person is competent to certify as aforesaid; and thirdly, that the Board of Trade shall judge it to be to the public advantage that the mark should be registered. The two last of those conditions are, in my opinion, as in that of the learned judge, matters reserved for the opinion of the Board of Trade: and it is not open to any person to say: "The Board of Trade have decided that the association or person is competent to certify and that it is to the public advantage, but I ask you, the Court, to hold that this is not so." The Legislature has deliberately left those two matters to the Board of Trade; but it has not, in my opinion, left the first matter to the Board. The language of the section as to that condition is quite different, and in my opinion points to its being a matter that has to be ascertained as a fact and not a matter that is to be simply ascertained in the opinion of the Board of Trade. I think the learned judge was also of that opinion.

But with regard to that first condition, it is said there is no appeal: that although it is not specified to be a matter entirely for the Board of Trade, it is not a matter that can be considered by the Registrar, and is therefore not a matter that can be considered by the Court, because the Court can only entertain an appeal from the Registrar. If the Board of Trade have come to a wrong conclusion upon that condition precedent to the application, then it is said some other proceedings must be taken and not proceedings by way of appeal from the Registrar. That contention I do not think is right. It seems to me that the learned judge rather favoured it, and in that respect I differ from him. It is quite true that the only appeal from the Registrar is the appeal that is given by statute. I will deal with the appeal section in a moment, but the procedure for an application under s. 62 is provided for by rr. 36–40 of the

Trade Marks Rules, 1920. This procedure does not very much differ up to a point from proceedings in an ordinary application for registration. Rule 39 provides: "Upon receipt of such case the Board may call for such evidence, if any, as they think fit and shall, if necessary, hear the applicants and the Registrar, and make an order determining whether and subject to what conditions, amendments, modifications or limitations, if any, the application may be permitted to proceed." Then r. 40 provides: "If such application is permitted to proceed the mark shall be advertised and the application shall be treated in all respects as if it were an ordinary application, and it shall be open to opposition in the same way and all such proceedings shall be had therein as if it were an application under s. 12 of the Trade Marks Act, 1905." Forms of application are given, to which we have been referred, and there is also a form, I think, for the opposition, although, of course, there is not a form for the grounds of the opposition. The forms of application are in effect the same, except that, of course, the person who is the applicant is described in different words. In the first of these two he is described as the person "who claims to be the proprietor thereof," and he is the person who can apply in the ordinary way: in the second form, which refers to the form under s. 62, the applicants are described as the persons "who desire the Board of Trade to permit the registration thereof." I do not think there are any grounds prescribed by the statute or the rules—I do not see how there could be—which a person may set up in opposition, but it was contended that the result of rr. 39 and 40 is, that on an application under s. 62 the only grounds of opposition are those which can be alleged in an opposition to an ordinary application, and that no other grounds can be taken before the Registrar. Now I cannot find any words to that effect. I have referred to what I think is the really relevant rule—namely, r. 40—and that provides, as I have said, that "the application shall be treated in all respects as if it were an ordinary application, and it shall be open to opposition in

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the same way and all such proceedings shall be had therein as if it were an application under s. 12 of the Trade Marks Act, 1905." That, I think, means simply this : that it shall be treated in all respects in the same way ; that opportunity shall be given for opposition ; that if any persons wish to oppose they must give notice of their intention to do so and must give the grounds of their opposition, and those grounds must be relevant to the application in respect of which they are given. I can see no limitation at all except that. The respondents wish to read in : It shall be open to opposition ; it shall be treated in all respects the same and no grounds of opposition can be taken except those that could be taken upon an ordinary application. I can see no such words, and I do not think it is the meaning of the rule. Of course the objection that the person applying was not a person who undertook to certify could not be an objection taken on an ordinary application, because that question does not arise on an ordinary application. I can see nothing that would prevent a person on an ordinary application from taking the objection that the person applying was not a person claiming to be the owner of the trade mark. It would be a very futile ground of opposition as a rule, because the applicant for registration would say, "I am," and there would be an end of the objection, because the rule does not say that he must be the owner, but that he must claim to be the owner. I notice in Sir Duncan Kerly's book on Trade Marks that one of the grounds of opposition given on an ordinary application is that the applicant is not a person who claims (properly) to be the owner of the trade mark. If that can be taken as a relevant ground of opposition on an ordinary application it seems to me to follow of necessity that it must be open, on an application under s. 62, to the opponent to take the objection that the person who is making the application is not a qualified applicant. If the one objection is open in one case the other objection is equally open in the other case. It may be useless in one case, but it may not be useless in the other, and I can see nothing to prevent it being taken

as a ground of opposition. If it be a relevant ground of opposition that can be taken, and if it be rejected by the Registrar, then there is clearly at once, by the express provision of the statute, an appeal from his rejection of the opposition, and that seems to me to dispose of that point altogether. It seems to me that it was clearly open to the Registrar and that it was clearly open on appeal from the Registrar to consider that matter.

There is one other matter which is vital and that is, whether that ground of opposition, having been taken, is substantiated. That rather splits itself into two parts. It is suggested, first, that in order to certify by a mark the person must make an application for a mark which speaks for itself; that there must be upon the face of the mark the statement of the fact which is intended to be certified by the mark. For some time I was rather inclined to think that was so. If that be correct of course these marks do not satisfy that condition at all, because these marks—there are more than one of them—consist of the word "Unis," which is only putting together the initials of a portion of the title of the applicants' Association, either with the word "France," or, in one case, without the word "France" at all. It is quite obvious that that word affixed to the goods as a mark does not of itself tell anybody looking at it whether it is intended to certify origin, manufacture, quality, accuracy or what it is intended to certify, and if it were essential for an association to certify by a mark which should speak for itself as to the characteristics certified, I think this mark does not do it. In my opinion that is not a correct contention. I do not think a person fails to undertake to certify by a mark merely because the mark in itself is not a proper mark to express his certificate. That no doubt is a matter to be taken into account by the Board of Trade when they come to consider whether or not they will permit the mark to be registered, and I think it would be quite open to them to say: "You say you are certifying by a mark a certain quality, or a certain characteristic of the goods; your mark tells nobody anything about it, and, therefore, we do not think it is a mark that

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can be put on the register." It seems to me they might very well deal with the matter in that way, but I do not think the section requires, as a condition precedent, that the mark should be a mark which expresses the characteristic to be certified.

The other part of the question, and much the more difficult one to my mind, is this. Does this Association in fact undertake to certify by a mark the origin of certain goods? I do not think it is necessary that they should wish to certify by their mark all the characteristics mentioned in the section. They may have a mark which may certify more than one, but the natural thing would be that they meant to certify one characteristic, and the characteristic which was meant to be certified here was origin. In order to see whether the Association does or does not undertake to certify it is necessary to look at what the Association is and what its objects are. It issues a small advertisement pamphlet (I do not know that we can look at that except just for information) which has, on the face of it, the mark "Unis, France"; it has also upon the face of it a Gallic cock of great dignity, and has at the bottom this legend: "The productions which bear this mark are guaranteed French," and then inside the pamphlet there is a list containing the names of the honorary president and honorary members, and the members of the managing committee of the Association, and they are persons of very high standing in the commercial world in France. I need not trouble about the honorary president; he is the president of the Chamber of Commerce in Paris; but the president is a member of the Chamber of Commerce and is the honorary president of a syndicate of electrical industries; the vice-presidents are persons also of high standing in the same way, and the rest of the board of management consists of the secretary and treasurer, who are both of them persons in a high commercial position; one is president of the Association of the Boot and Shoe Furnishing Trades and the other is the president of the committee of the Association of the Paper and Allied Trades. One of the paragraphs is: "It is most

difficult, in fact, to fix regulations to determine the actual national character of an industry, this especially is a matter to be dealt with by an Association, established according to French law, having a thoroughly French point of view and not always looking after the interest of foreigners. It is not an easy matter to decide, without being an authority, whether a product, into the manufacture of which has entered either a small or large proportion of foreign materials or parts, can be described as French made." Then there is what I may call the statutory articles of association, which really correspond to our articles of association in the case of a company. They form the statutory constitution of the Association, which is very much the same as is stated in the advertisement to which I have referred. They state the objects. "The principal object of the U.N.I.S. is the establishment and defence of inter-syndical collective marks intended especially to authenticate French products. The use of these marks is controlled by general regulations drawn up by the grand committee of the U.N.I.S." Then there follow the general regulations the first of which is this : "The object of the marks is to certify the French origin of the goods to which they are affixed," and then it describes them : "The said marks are distinguished by the two words 'Unis, France.'" That is not quite correct, because there is one mark without the word "France," but that is what they state in their regulations. They then proceed to carry out that object stated in this way. I do not mean to say I am giving every regulation very accurately, but broadly it is this : They do not themselves manufacture ; they are an association of persons who carry on different businesses and manufacture different products, but they admit as members of the Association what are called syndicates of the trades, and they authorize those syndicates to use these marks under certain conditions, and I think it is possible—I am not sure, but I will assume it to be the fact—that they authorize those syndicates to allow the use of the marks by persons who are not members of the particular syndicate. But they only allow the use of the marks under certain conditions prescribed

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by the rules which they lay down for those syndicates. One of their general regulations is that "The admission of a syndicate entitles it to allow the use of the U. N. I. S. marks by manufacturers, whether members or not of the syndicate, who satisfy the following conditions: (1.) The only manufacturers who may be allowed to use the inter-syndical marks are French manufacturers established in France who have adopted the syndical regulations of a syndicate of their industry. Manufacturers of foreign origin will only be allowed to use inter-syndical marks if they have been naturalised for more than fifteen years, except in special cases to be considered by the Superior Committee at the request of the interested syndicate. The use of inter-syndical marks by firms or companies will not be allowed except in cases where they may be considered as bona fide French businesses. It is immaterial whether the firm or company is legally constituted according to French law or according to a foreign law; the principal factors of determination which will be taken into account, either at the time of the admission of the firms or companies or at any subsequent times, being the nationality of the members of the Board of Directors, that of the controlling staff and that of the chief holders of capital." As I have said, they have prescribed a sort of model table of regulations for the syndicates which they admit to be members of the Association. I am using these expressions because they are convenient ones, for, of course, these are all unincorporated bodies according to our law, and the syndicate cannot become a member of the Association, although its members may become members of the Association. The Association itself is not anything but an unincorporated body, but, as I have said, it supplies a form of model regulations which are intended to secure the same end as the general regulations, and one of the general regulations provides this: "At the expiration of a period of one month from the date of the notice mentioned in art. 14, the users of the excluded syndicate shall altogether cease to use the inter-syndical marks unless they obtain from some other affiliated syndicate permission to use them, failing which they will be liable to

be prosecuted for such use," and the ground upon which expulsion is provided is any breach of the regulations, either those of the parent Association, or those of the syndicate. That is the way in which this matter is carried out, and the question is whether, in those circumstances, this Association undertakes to certify by mark the origin of certain goods. It does not seem to me to matter, as I have said, for this purpose whether the mark itself on the face of it states that it is certifying origin to the exclusion of the other characteristics, or whether it does not, but the object of the Association's mark is to certify origin. But the argument is this, as I understand it: The Association does not undertake to certify by mark the origin of the goods, because what it does is to license somebody else to certify. I do not think that is correct, although it is an attractive argument. I do not think it is correct for this reason, that it requires reading into the section the words, which I understand were accepted by the learned counsel, "undertakes to certify after investigation"; "investigation" being used in the largest sense, after examination of documents and everything and not only of the goods. It seems to me that the alteration of the section was intended to do away with that necessary investigation. It certainly, in words, does away with examination, and I think it was intended to include an association which undertakes to certify by a mark, although it may do that without any actual investigation itself, with regard to the goods upon which the mark is placed. What the Association does is this: It says to the world by its advertisement and by its constitution, and to the Board of Trade when it makes an application to them, that its mark is intended by it to designate to everybody that any goods upon which it appears are French in origin, and then it goes on to secure as far as it can that the mark shall not be put upon any goods that are not so, by the regulations and by the power of expulsion from the Association of persons who do use it in any other way. It leaves to those persons, no doubt, the investigation of the facts, and the actual putting of the mark upon the goods; but it retains this

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control by saying that it can exclude those persons from the Association and from the use of the mark so far as the law of France allows it to prosecute them, as it says it will do, if their investigations have been insufficient and do not show that the goods are of French origin, or if they have not investigated at all, or either carelessly or dishonestly put the mark upon something which is not made in France. That is, in my opinion, the Association undertaking to certify by a mark. I do not quite know, if it were necessary to certify, after investigation, who the persons would be who would have to make the investigation. I suppose it could not be said that all the documents with regard to all goods upon which the mark was to be placed were to be brought before this committee. It would have to be done by agents of some sort or another, and what the Association does is this: instead of employing direct agents of their own, it says, We will bring into our Association persons whom we trust to investigate the matter and we will then, on their assurance, allow our marks to be used, but if they use them wrongly then we will turn them out of our Association and they shall not use our marks at all, and the mark that goes forward is the mark of the Association. That is, in my opinion, undertaking to certify by the mark that these goods are of French origin, and I do not think it matters in the least that the restrictions which it puts upon the use of the mark do not allow the mark to be used on all French goods. It has never purported to say that all French goods are marked with its mark and none others are genuine. What it has said is that its marks shall not be put on anything except French goods, and that seems to me to be a denoting by a mark of the origin of the goods. That, to my mind, is the most difficult and really the vital question in this case, and when that is decided, as I think it ought to be decided, there is an end of the appeal. I think therefore the appeal fails and must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. Sect. 62 of the Trade Marks Act, 1905, as amended by the Trade

Marks Act, 1919, allows the Board of Trade, upon certain conditions specified in the statute, to permit the associations or persons described in the section to register as a trade mark certain marks, although the applicants seeking to register may not be trading associations or traders and the mark may not be attached to any goodwill. That is the whole point of the section.

Now there are certain conditions attached to the exercise by the Board of Trade of that power. The first of them relates to the position of the applicants. The section begins with the words, "Where any association or person undertakes to certify" certain characteristics "of any goods by mark." That, in my opinion, is a condition precedent to the exercise by the Board of Trade of all the powers conferred upon them by that section.

The second of the conditions is expressed in the words, "if and so long as they," the Board of Trade, "are satisfied that such association or person is competent to certify as aforesaid." That condition seems to me to be one which gives to the Board of Trade a discretion which is not capable of being interfered with by the Court. The third condition is that the Board of Trade shall "judge it to be to the public advantage." In that case also it seems to me that the question whether or not the Board of Trade shall judge it to be to the public advantage is a matter with which the Court has nothing to do. I come now to deal with the first condition and the real substance of the present appeal, which is whether that condition has been fulfilled by the applicants in the present case. Peterson J. has made an order dismissing an appeal from the Registrar, who had disallowed an opposition promoted by the present appellants and has allowed the application in question to proceed. It is from that order that the appeal is brought.

The first point taken by the respondents is that the question whether or not the applicants satisfy the conditions, on satisfying which alone they are entitled to seek for registration of their mark under s. 62, as amended, is not a matter with which the Registrar was competent to deal, and, that

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being so, that his decision thereon was not subject to appeal to the Court and the decision thereon is not subject to appeal to this Court. On that point I have nothing to add to what has been said by the Master of the Rolls. I am clearly of opinion that that point fails and that the question whether the provisions of the statute come into operation at all is a question which must be determined by the judicial tribunal before whom the questions under the statute come and is therefore subject to appeal from the decision of that tribunal.

I now proceed to deal with the question on the merits. Does this Association undertake to certify the origin, material, mode of manufacture, quality, accuracy or other characteristic of any goods by mark used upon or in connection with such goods? The opponents, the present appellants, say that it does not. To see whether that is so or not one must look at the constitution of the Association in order to understand what it is that it undertakes to do. Before however I do so, I wish to say that I think the word "undertake" in the section does not mean undertake in the sense of promising to certify, or putting itself under an obligation to do so. I think the word "undertake" there is substantially equivalent to, makes it its business to certify, or makes the certification a part of its undertaking (to use a phrase which is common enough in referring to matters of business), and it is with a view of seeing whether that is so or not that I look at the constitution of the Association. We have before us, first, what are called the Statutes of the Association, corresponding to the memorandum and articles of association of a company in this country. The second of those articles states that the Association has, as its first object, the creation and protection of collective inter-syndical marks particularly destined to authenticate French products. The second is the establishment of general regulations determining the conditions on which such marks shall be used. The third is the licensing of the use of such marks. The fourth is the control of the use of marks and with a view of watching over such use and discovering and prosecuting misuse and

infringement. Then the statute provides—I am giving the effect of it—that those syndicates shall be members of the Association who desire to give to their members the benefit of the use of the marks and who shall have adopted special regulations agreeing with the general regulations of the Association. I think I need not refer to anything more. The statute of the Association shows that it is their business to create and protect certain marks the object of which shall be to authenticate French goods and, further, to control the use of those marks and to see that those marks are not misused. The object of the marks is therefore to denote the origin of the goods, that they are French products. I now turn to the general regulations. I do not propose to read them. They contain stringent provisions for punishing any infringement, any misuse of the marks by expulsion, and provide that the marks shall only be used upon goods produced in France and made in France by Frenchmen, with a certain qualification by which naturalised Frenchmen of certain standing may be included in the term "Frenchmen." But the substantial point is that the marks are intended to be used in connection with goods made in France and by Frenchmen. The Association therefore, as it seems to me, does intend that these marks shall denote the French origin of the goods upon or in connection with which the marks are used. Now is it part of the business of the Association to certify that this is the case? I think it is. The marks, when used according to their constitution and their rules, do certify that the goods comply with the requirements of their rules; that is, that they are French goods produced in France and by Frenchmen. It seems to me that they do, by thus making and enforcing their rules, because, of course, I assume that they would insist upon them, make it a part of their business to certify by means of the use of the marks that the goods on which they are used are of that particular origin. What is said as to that is that they do not do it themselves; that they do not affix the marks themselves; that they do not make any investigation themselves. It may well be that the hand which

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actually affixes the mark, or brain which actually makes the investigation as to the origin of the goods, is not that of a direct officer of the Association, but it is that of a person or persons whose duty towards the Association, under severe penalties in case of infringement, is to make the necessary investigation and to affix the mark only to goods which, after such investigation, are found to possess the necessary qualifications. Under those circumstances I think the Association does here satisfy the condition of an Association which undertakes to certify by mark the origin of the particular goods.

But it is said that the Association does not undertake so to certify, because the mark which it proposes to use does not, of itself, indicate the origin of the goods. Whether or not the section contemplates that every mark which can be registered under this section shall, of itself, indicate what is the characteristic of the goods intended to be certified may be open to doubt. For myself, I should be inclined, as at present advised, to say that a mark which is adopted for that purpose, and which is capable of becoming known as used for that purpose, might be a sufficient mark, but, however that may be, I am quite satisfied that it is not a condition precedent to the application for registration that the mark should be of that or any other particular character. That is a matter which will have to be considered by the Board of Trade when they come to determine whether, having power to permit registration of the mark, they will permit it. That objection therefore, it seems to me, fails, and, on the whole, inasmuch as, in my opinion, this Association does fulfil the condition precedent to its right to make the application, I think that the Registrar was right in allowing the application to proceed, and the learned judge was right in refusing to interfere with his decision.

The appeal must therefore be dismissed.

YOUNGER L.J. I agree with the view of s. 62 of this Act as amended, that when an applicant, whether an association or an individual, applies to be registered as the proprietor

of a special trade mark, it is a condition precedent to his capacity so to be registered that whatever the words may mean, he undertakes to certify one of the specified characteristics of the goods in respect of which he seeks to have the trade mark registered. In my opinion also, when the application for such a trade mark is directed by the Board of Trade to proceed, then whether or not the rules applicable to the further progress of the matter fetter the powers of the Board of Trade—I can see nothing which precludes the opponents to the registration of such a trade mark from objecting, that in fact the applicant is not qualified to be registered as its proprietor, on the ground that he does not, within the meaning of the section, undertake to certify one or other of these characteristics.

I think, therefore, that it was not only open to, but that it was incumbent upon, the learned judge to consider in this case whether this Association had so undertaken; and for myself I very greatly regret that we have not had the benefit of the learned judge's own view upon that question, which is to my mind one of extreme nicety. In my opinion, upon the true construction of s. 62 as amended, the undertaking to certify or the readiness to certify, if that be the better word to use, must be offered by the applicant himself; in this case by the Association or by agents on its behalf. I think that the undertaking is, in the terms of the statute, intended to be personal to the applicant: he alone is qualified to give it. So much is shown, to my mind clearly enough, by three subsequent provisions of the section. The first is that the registration will not be permitted by the Board of Trade at all unless the Board are satisfied that the applicant at that moment is competent to certify; and while I quite agree that the word "competent" involves honesty and reliability, it means, in my view, a good deal more in this connection: it involves, as it seems to me, skill and knowledge and ability with reference to the duty undertaken: skill, it may be of a high order where the characteristic certified is, for instance, quality or accuracy. Secondly, the competence must not only be possessed by the applicant at

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the moment of his application, but in the judgment of the Board of Trade it must continue to be his: and the implication of the section, I think, plainly is that if the competency is in the opinion of the Board of Trade lost, registration will be withdrawn. And I think that the personal qualities, in this respect, of the applicant are also indicated by a third provision of the section—namely, that the mark, when granted, is to be neither transmissible nor assignable without the consent of the Board of Trade. I myself regard that restriction as being imposed upon applicants for a special trade mark, as distinguished from the ordinary applicant who has a business and a goodwill along with which it is assignable. These applicants need not possess any business or any goodwill of which these special trade marks may form a part. Their ownership is accordingly in a real sense made personal to themselves: its continuance is conditioned by the existence of their own personal competence or that of their assignees.

I have myself been much tempted to accept the view of Mr. Maugham that Sir Duncan Kerly justifies the registration of these trade marks in favour of this Association, not because they are going to certify or because they are competent to certify, in the sense in which I have used the word, but because they are going to constitute themselves guardians of these marks when granted, their only assurance being the equivalent of an assurance that the marks will never be misused. If that be the true view of the matter, I have a difficulty in seeing that the function which the Association undoubtedly intends to discharge with reference to these marks, if they be granted, would be a compliance with the condition prescribed by the section. Indeed, as at present advised, I do not think it would in the general case be such a compliance; but I am not prepared to differ from the view of my Lord and the Lord Justice that when regard is had to the constitution of this Association, it has not been shown that they do not, within the meaning of this section, undertake to certify origin—a certification involving little if any personal skill. I think it is correct, on the whole, to say—although I have reached the conclusion with considerable

hesitation—that this Association does, within the meaning of s. 62 as amended, undertake to certify so much, and that accordingly it is qualified to be the proprietor of a special trade mark of origin. But, like my Lord and the Lord Justice, I see very great difficulties in the way of permitting in general terms a registration of a special trade mark in itself unmeaning with reference to the article to which it is to be attached, when there is no reference on the face of it to the particular characteristic of the goods which its use is intended to connote. I can see that in many cases, if the registration be quite general, it would be difficult to prevent a mark (the registration of which has been granted solely because the applicant has established to the satisfaction of the Board of Trade that he is competent to grant a certificate of origin) becoming known to the public as a mark of quality ; and I can see that there may be serious danger ahead if great care in relation to such a registration is not exercised by the Board of Trade. But I agree with my Lord that this is not a matter for us ; it is a matter for the Board of Trade ; and as I understood from Mr. Dighton Pollock, the Board will, even in the present case, be prepared to consider it carefully on representations to that effect with reference to these trade marks being made by the appellants.

I agree, therefore, on the whole that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants : *Grundy, Kershaw, Samson & Co.*

Solicitors for the respondents : *Rowe & Maw.*

Solicitor for the Comptroller : *Solicitor to Board of Trade.*

W. I. C.

ASTBURY J.

1922

May 24, 25, 26, 31; *June* 1.

In re HOLLIDAY.

[1922. H. 033.]

Subinfeudation—Crown Tenant—Tenant in capite ut de corona—Quia Emptores (18 Edw. 1, st. 1)—34 Edw. 3, c. 15.

Subinfeudations in fee simple by the King's tenants in capite ut de corona were (semble) forbidden by Quia Emptores. In any case they were impliedly declared invalid by the 34 Edw. 3, c. 15.

Bradshaw v. *Lawson* (1791) 4 T. R. 443 and *Chetwode* v. *Crew* (1746) Willes 614, 619 applied.

PETITION to traverse an inquisition of escheat.

The ancient manor of Brough in Westmorland, the records of which went back to a charter of John of October 28, 1203, confirmed on an Inspeximus of May 12, 1398 (Patent Roll Chancery, 21 Ric. 2, Part III., membrane 16), was held of the King in capite ut de corona, and until military tenures were turned into free and common socage in 1660, it was held by knight service.

In 1837 Atkinson held Blackacre, a parcel of the manor as a customary (tenant right) tenant on the rolls. It comprised only about thirteen acres out of the very large acreage of the manor.

By an enfranchisement deed of July 7, 1837, the then lord granted and enfranchised Blackacre unto and to the use of Atkinson, his heirs and assigns freed and discharged from all copyhold and customary tenure, fines, heriots, etc., but from thenceforth "to be holden of the lord or lords, lady or ladies, of the said manor in free and common socage, and by such suit of Court as hath been usual and accustomed for or in respect of the same," which suit of Court Atkinson covenanted to perform.

This deed was on a printed form said to have been settled by Lancelot Shadwell (afterwards Vice-Chancellor) who with Butler, Bentham, Shepherd, Duval, Sanders, Chippendale, and Bellenden Ker formed the members of the Old Conveyancers' Club.

The question was whether, notwithstanding the Statute of

Quia Emptores, this was a valid subinfeudation. A similar form (not in evidence) was said to be in use on Lord Lonsdale's estate under the powers of a private Act.

On January 16, 1910, Holliday, a bastard, in whom Blackacre had become vested, died seised thereof a bachelor and intestate.

The present lord then took possession by escheat and on March 8, 1910, the steward reported the matter to the Treasury, pointing out that there was some furniture to which the Crown was entitled.

The Crown did not admit the lord's right to the escheat, but he continued in possession of Blackacre until May 19, 1915, when he sold it to his steward, the petitioner, for 500*l.*

On May 30, 1921, an inquisition of escheat was held and the jury found that Blackacre had escheated to the Crown.

On March 30, 1922, the petitioner presented this petition for leave to traverse the inquisition on the ground that the lord of the manor in 1837, being a tenant in capite ut de corona, was entitled to make the subinfeudation of 1837 to Atkinson to hold of himself the lord.

Micklem K.C. and *Stuart Moore* for the petitioner. This being a pure question of law, the Court can determine it, and, if it is in favour of the petitioner, probably no further proceedings to quash the inquisition will be necessary: *In re Parry.* (1)

There are really only two questions. First, Did the Statute of Quia Emptores apply to tenants in capite holding of the King as King (ut de corona) and not merely as owner of a manor or other honour (ut de honore)? Secondly, If not, did the 12 Car. 2, c. 24, bring them within Quia Emptores?

Now the King's tenants in capite ut de corona were under one code. Ordinary freemen including tenants in capite ut de honore were under another code: Digby's History of Real Property, 5th ed., p. 157. Before these codes both classes could alienate the whole of their holding by substitution or subinfeudation, or part of it by subinfeudation.

(1) (1866) L. R. 2 Eq. 95.

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They could not alienate a part by substitution, because the lord's services were entire and indivisible. These rights were separately restricted by the respective codes.

The restrictions of the King's Tenants code were as follows. The Statute or Ordinance De Prerogativa Regis, probably passed about 1276—i.e., 4 Edw. 1, though appearing in the statutes as 17 Edw. 2, st. 1, c. 6 (see *Whistler's Case* (1)), prevented the King's tenants in capite by knight service from alienating without leaving sufficient for the services, unless they had the King's licence. In other words they were restrained from making unlicensed alienations of their service lands, but the alienation of surplus land was unrestricted. This small holding would probably have been considered surplus land, but it is unnecessary to rely on that. The licence was changed to a fine by 1 Edw. 3, c. 12.

Now although De Prerogativa Regis was not retrospective, Edward III. was in the habit of seizing lands alienated without licence in the time of Henry III. and before. This occasioned the Petition of Grievances of 1355 (29 Edw. 3) printed in Rotuli Parliamentorum, vol. ii., p. 265, and the matter was put right in 1360 by the 34 Edw. 3, c. 15, which confirmed these old alienations. This statute no doubt speaks of alienations "to hold of themselves," but this would have been the common form unless they were parting with their entire holding by substitution, in which case the King would have got a new tenant with all the services, and suffered no damage.

The restrictions of the freemen's code were as follows. Magna Carta 9 Hen. 3, c. 32, restrained freemen from alienating their service lands, and c. 31 in effect put tenants in capite ut de honore in the same category as freemen. The freemen however went on subinfeudating until, in 1290, the great men and other lords, having no royal prerogative to help them, obtained the Statute of Quia Emptores for their own protection.

This statute, 18 Edw. 1, st. 1, enabled every freeman to sell his lands or part of them "so that" the feoffee should hold the same of the chief lord, with apportionment of services

(1) (1613) 10 Rep. 63A, 64A.

if he sold part. But as the statute did not bind the Crown, it could confer no rights on Crown tenants, and it would be very strange to construe a proviso on a right of alienation not given to them as a general provision against subinfeudation. The true view is that they were not within this statute at all, but only under De Prerogativa Regis, which does not forbid subinfeudation.

The fact that they were not within Quia Emptores is recognized in Stanford on the Prerogative (1548), p. 28B; Wright's Tenures, 1st ed. (1730), p. 162; Co. Litt., 43B; Blackstone's Commentaries, 8th ed. (1778), Vol. 2, pp. 91, 289; and Williams on Real Property, 13th ed., p. 63. Blackstone apparently thought that the confirmatory statute of 34 Edw. 3, c. 15, impliedly forbade subinfeudation, but having regard to its language and origin, this is untenable.

In 1660 the 12 Car. 2, c. 24, was passed. At that date the King's tenants in capite ut de corona could alienate their surplus lands without restriction and their service lands on payment of a fine. This statute abolished the burdensome incidents of military tenure, including fines for alienations, and turned all tenures into free and common socage. It did not however forbid subinfeudation or in any way subject the King's tenants to Quia Emptores. As far as they were concerned it merely made them socage tenants and abolished the fine on alienation. Being therefore no longer subject to any restrictions they could thenceforth alienate in any way they pleased—i.e., either by subinfeudation or substitution, and this right continues to the present day: see Serjeant Manning's note to *Rex* v. *Wilson*. (1)

Sir Ernest Pollock A.-G. and *Dighton Pollock* for the Crown. The statute of 34 Edw. 3, c. 15, impliedly declared that unlicensed subinfeudations by the King's tenants after Henry III.'s time were void. They were also really forbidden by Quia Emptores. This statute had a double aspect. It did not bind the Crown, or enable Crown tenants to alienate without licence. But it bound the tenants, and therefore prevented subinfeudation. This was clearly for the King's

(1) (1829) 5 Man. & Ry. 140, 156.

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benefit as well as for the benefit of the great lords : see Challis on Real Property, 3rd ed., p. 20 ; Lord Redesdale's Report on the Dignity of a Peer, vol. i., p. 399 ; Pollock and Maitland's History of English Law, 2nd ed., vol. i., p. 337 ; Scriven on Copyholds, 7th ed., p. 332.

Assuming however that the tenants in capite ut de corona were not originally bound by Quia Emptores they became so bound when they were reduced to socage tenants by the 12 Car. 2, c. 24. This Act abolished tenures in capite, meaning tenures in capite ut de corona, and the tenants simply became tenants in socage ut de honore, and as such within Quia Emptores. The statute is explained in Challis, 3rd ed., p. 23, and Madox' Baronia Anglica, p. 236.

The distinction between tenants in capite ut de corona and ut de honore was always well known : see Termes de la Ley "Tenure in Capite" ; Brooke's Abridgment "Tenure" Placita, 61, 94 ; Madox' Baronia Anglica, p. 171 ; *Gilbert's Case* (1) ; and if there had been any substance in the petitioner's point it would at least have been mentioned in *Bradshaw* v. *Lawson* (2) or *Chetwode* v. *Crew* (3), where subinfeudations of 1620 and 1736 were held invalid under Quia Emptores. The judgments were in general terms and contained no hint of any possible exception to the proposition that since Quia Emptores no valid subinfeudation could be effected.

Micklem K.C. in reply. *Bradshaw* v. *Lawson* (2) and *Chetwode* v. *Crew* (3) were treated as cases of ordinary subinfeudation. The manors may not have been held in capite at all. In the first case the manor of Halton was in Lancashire, where manors held of the Crown were all held ut de honore. This was notorious, and the present point was neither raised nor raiseable. In the second case the manor was Muckleston in Staffordshire and as the point was not raised, this manor also was probably held ut de honore, if held in chief at all.

In *Doe* v. *Huntington* (4) the effect of a subinfeudation

(1) (1538) Dyer, 44A.
(2) 4 T. R. 443.
(3) Willes, 614, 619.
(4) (1803) 4 East, 271.

of 1672 was discussed, but the subinfeudation itself was not challenged. In *Griffith* v. *Clarke* (1) a release to a tenant in ancient demesne reserving the services was held good, though as appears from *Doe* v. *Huntington* (2), where the case is fully set out, the release was after Quia Emptores: see also *Blake's Case* in the year book 49 Edw. 3. 7. also set out in *Doe* v. *Huntington*. (3)

An unlicensed subinfeudation by the Lord of Monmouth in 1306 is recorded as a precedent in Madox' Formulare Anglicanum, p. 199, No. 334, and the petitioner produces many instances of licensed or confirmed subinfeudations from the Patent Rolls, both before and after Quia Emptores. If however the tenants in capite were really precluded from subinfeudation by Quia Emptores, how could the Crown's licence affect the matter? The Crown could license the alienation, but how could it license subinfeudation in the direct teeth of an Act of Parliament?

The Crown cannot therefore rely on Quia Emptores. It is driven to rely on an implied prohibition in 34 Edw. 3, c. 15. But even if it were possible to imply any such prohibition in this confirmatory statute it would only forbid subinfeudation without licence. That licence was replaced by a fine, which was abolished by 12 Car. 2, c. 24, so that the prohibition, if it ever existed, is gone.

ASTBURY J. This is a petition to traverse an inquisition of escheat, the facts stated therein being admitted. It raises issues of law of a very exceptional and difficult character as between the petitioner and the Crown. Strange as it may appear at the present day, the issue to be determined on the petition depends primarily upon the construction of statutes passed in the 13th and 14th centuries, and is, whether a lord of a manor held of the King ut de corona, as distinct from ut de honore, could in 1837 subinfeudate freehold land forming parcel of the manor, so that it should thenceforth be held of him and not of his paramount lord the King.

(1) (1583) Moore, 143. (2) 4 East, 290.
(3) 4 East, 291.

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The petitioner contends that this question has not during the last six centuries been directly decided, and points out that since 1660, when the statute 12 Car. 2, c. 24, was passed, it is only in very exceptional circumstances that it can be of any practical importance, as for instance when a tenant of land so aliened dies intestate and without leaving any heir, so that a question of escheat arises. [His Lordship then stated the facts and continued :] The question is whether the subinfeudation of 1837 was valid against the Crown. I am told that on Lord Lonsdale's estate a similar form of subinfeudation is in use in pursuance of some Act of Parliament, but I know nothing further about it.

I will first refer to certain cases of subinfeudation that have been mentioned during the argument.

On July 20, 1275, Edward I. granted the following licence [Patent Roll Chancery, 3 Edw. 1, membrane 16] : "The King to all etc. greeting. Know ye that we have given licence to our beloved and faithful Almaric de St. Amand to sell to whomsoever he wishes all his land which he holds in the Ville of Kirkeby in the County of Leicester and we have given licence to him to whom he shall wish to sell that land to buy the same land of the same Almaric so that he and his heirs should hold the aforesaid land of the aforenamed Almaric and his heirs upon the same conditions and with the same liberties as the same Almaric up to now held the aforesaid land of us and our predecessors, kings of England, and we are willing that such sale and purchase shall be ratified and pleasing for us and our heirs for ever." This licence would appear to have been granted under the prerogative that I shall refer to later.

On July 26, 1276, Edward I. granted a somewhat similar licence to Thomas de Clare [Patent Roll Chancery, 4 Edw. 1, membrane 13]. It has been read during the argument, and it is unnecessary to refer to it further.

On November 3, 1279, Edward I. granted a similar licence to John de Boun [Patent Roll Chancery, 7 Edw. 1, membrane 5] which has been referred to during the argument.

After the statute of Quia Emptores the following form of

feoffment dated [July 25, 1306] 34 Edw. 1 appears as a precedent in Madox' Formulare Anglicanum, p. 199, No. 334: "Know all men present and to come that we Henry of Lancaster Lord of Monmouth and of the Three Castles have given and granted and by this our present Charter confirmed to Alexander Moriz a piece of our land. . . . . To have and to hold of us of our heirs and of our assigns the aforesaid land with all its appurtenances to the aforesaid Alexander to his heirs and to his assigns freely quietly wholly heritably well and in peace for ever. The aforesaid Alexander his heirs or his assigns rendering to us to our heirs and to our assigns each year 12 pence sterling for all manner of services secular customs and demands that is to say half at the feast of St. Michael and the other half at the feast of the Annunciation of Our Lady. And we the aforesaid Henry our heirs and our assigns the aforesaid piece of land with all its appurtenances as is aforesaid to the aforesaid Alexander his heirs and his assigns will warrant acquit and defend against all men for ever." I have no knowledge however of the circumstances under which this feoffment was made if it ever took place. (1)

On December 28, 1325, Edward II. confirmed a subinfeudation of the previous day as follows [Patent Roll Chancery, 19 Edw. 2, Part I., membrane 8]: "The King to all to whom etc. greeting. We have inspected a certain writing which our beloved and faithful Hugh le Despenser Lord of Glamorgan and Morgan made to William Fitzpaul of Cardiff in these words: 'To all who see or hear this present writing Hugh le Despenser Lord of Glamorgan and Morgan greeting in the Lord. Know ye that we have given granted and by our present writing confirmed to William Fitzpaul of Cardiff the Manor of Rockhampton with all its appurtenances except the advowson of the church of the same manor to have and to hold all the said manor with its appurtenances except the advowson aforesaid to the said William and his heirs for ever by the service of one Knight's fee and to do suit at our court of Tewkesbury every three weeks in exchange for the manor

(1) [At any rate the original (in French) was sealed: see Madox' note.—F. P.]

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of Waleton to us and our heirs by the said William given and granted for ever . . . . Given at the Burgh of St. Edmunds on the 27th day of December in the 19th year of the reign of Our Lord King Edward the son of King Edward.' We although the aforesaid manor is held of us as it is said in chief, of our special grace nevertheless, holding the aforesaid gift grant and confirmation ratified and pleasing, grant and confirm them for us and our heirs as far as in us lies to the aforenamed William and his heirs as the writing aforesaid reasonably testifies." That is a case of subinfeudation ratified by the King on December 28, 1325.

On December 1, 1378, Richard II. granted the following pardon and licence to aliene [Patent Roll Chancery, 2 Rich. 2, Part I., membrane 15]: "The King to all to whom etc. greeting. Know ye that whereas the late venerable father in Christ Henry Bishop of Worcester granted one messuage 70 acres of land 3 acres of meadow and 12 shillings rent with appurtenances in the manor of Bishops Wyke which is parcel of the foundation of the Bishopric of Worcester and so is held of us as it is said and which certain messuage lands meadow and rents, because John Wyche who held them in fee was a bastard and died without heir of his body, came into the hands of the same bishop as his escheats to Richard Thurgrym to be held for his life for 6*s.* 4*d.* to be rendered yearly therefore to the same bishop and his successors. And the aforesaid Richard by virtue of the same grant entered into the said messuage land meadow and rent with the appurtenances and the prior and chapter of the church of Worcester ratified and confirmed the aforesaid grant without obtaining our licence upon this. We of our special grace have pardoned the trespasses committed in this behalf and have granted for us and our heirs as far as in us lies to the same Richard that he should have and hold for the whole of his life the messuage land meadow and rent aforesaid with appurtenances in accordance with the force and effect of the same grant of the abovesaid bishop. And further of our more ample grace we have granted and given licence for us and our heirs as far as in us lies to the aforesaid bishop that he with the assent

of his chapter shall be able to grant to the aforenamed Richard that he should have and hold the same messuage land meadow and rent with the appurtenances to him and the heirs of his body issuing, of the aforesaid bishop and his successors for the same services by which the aforesaid John held the said messuage land meadow and rent with the appurtenances while he lived of the aforenamed bishop."

The two latter instances prove nothing except that these grants could be made or were made at these dates by virtue of a royal licence or ratification.

Turning now to the relevant statutes. By c. 32 of Magna Carta as issued in the 9th year of Henry III. it was enacted as follows: "No freeman from henceforth shall give or sell any more of his land, but so that of the residue of the lands the lord of the fee may have the service due to him, which belongeth to the fee." This appears to have been the first restriction in this country, since the Conquest, of a tenant's free right of alienation, which in those days apparently almost always, if not entirely, took the form of subinfeudation, objection to this being taken by the mesne lords who found their rights and privileges interfered with by this practice.

Cap. 31 of this same issue of Magna Carta enacted: "If any man hold of any eschete, as of the honour of Wallingford, Nottingham, Boloin, or of any other eschetes which be in our hands, and are baronies, and die, his heir shall give none other relief nor do none other service to us than he should to the baron, if it were in the baron's hand. And we in the same wise shall hold it as the baron held it; neither shall we have by occasion of any barony or eschete, any eschete of keeping of any of our men, unless he that held the barony or eschete elsewhere held of us in chief." The effect of this was that escheated lands regranted by the Crown—i.e., tenures newly created to be held ut de honore, as distinguished from those held ut de corona, should thenceforth be subject to the same rights, duties, incidents and obligations only, as they had been subject to immediately before the escheat.

The question therefore raised in this petition is confined to

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land held of the Crown ut de corona, as land held ut de honore became thenceforth subject to the same law and incidents as that held of the mesne lords.

This is explained in *Gilbert's Case* (1) as follows: "It was found by office that one Gilbert held of the King as of his honour of Plimpton, and other lands as of his manor of Dartington in the county of Devon, which came to the hands of our lord the King by reason of the attainder of Henry Courtney late Marquis of Exeter attainted of high treason by the common law and also in parliament. The question was in the exchequer, whether this be a tenure in capite or not? But it seemed no tenure in capite, for the tenures in chief began in ancient times, upon the grants of the King, to defend his person and his crown and royalty against enemies and rebels. And the words de prerogativa regis, c. 1, prove this: The lord the King shall have the custody etc. so that however they have held of the King from of old of the Crown, yet the King can at this day make a tenure in capite of him if he reserve it to his person, and as a service in gross; but if he reserve the tenure as of his manor, or honour, or castle, clearly this is no tenure in capite; for the services shall be regardant to the manor, honour, or castle and not about the person of the King."

By the statute or ordinance De Prerogativa Regis which appears in the statutes at large as 17 Edw. 2, st. 1, but which for the reasons I will state presently was apparently originally passed or issued in the first two or three years of the reign of Edward I. it was enacted or ordained in c. 6 as follows: "None that holdeth of the King in chief by knights service may alien the more parts of his lands, so that the residue thereof be not sufficient to do his service, except he have the King's licence; but this may not be understood of members and parcels of such lands." This imposed a similar restriction on the King's tenants to that imposed on freemen by c. 32 of Magna Carta; with the addition of the right of the King to grant licences notwithstanding, for which licences fines were exacted and considerably made use

(1) Dyer, 44A.

of; and it confirms the view that c. 32 of the great charter did not apply to Crown tenants.

In the statute Quia Emptores, 18 Edw. 1, st. 1, on which the question before me largely turns, and which was passed at the instance of the great men and other lords, there are two sets of provisions, with a full stop between them in the original statute, which have to be considered in the present petition. After reciting that "Forasmuch as purchasers of lands and tenements of the fees of great men and other lords, have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors, and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands and tenements belonging to their fees; which thing seemed very hard and extream unto those lords and other great men, and moreover in this case manifest disheritance," it was enacted by the first set of provisions "that from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before."

The second provision is as follows: "And if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the services, for so much as pertaineth or ought to pertain to the said chief lord for the same parcel, according to the quantity of the land or tenement so sold."

The first of these provisions did not in my judgment affect the King or his tenants in capite in the sense of giving the latter any free right of alienation, but the second provision may, it is suggested, have been intended to bind them where they had made alienations of their lands under the above provisions of the prerogative ordinance, although they are not referred to in express terms.

By the statute 1 Edw. 3, c. 12, it was provided that: "Whereas divers people of the realm complain themselves

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to be grieved, because that lands and tenements which be holden of the King in chief, and aliened without licence, have been seized heretofore into the King's hands, and holden as forfeit; the King shall not hold them as forfeit in such case, but will and grant from henceforth of such lands and tenements so aliened there shall be reasonable fine taken in the chancery by due process." This seems in some measure to confirm the above suggestion, as it resulted in the King's tenants in capite now obtaining a qualified free right of alienation—i.e., subject to fines being exacted.

By the same statute, c. 13, the alienation without licence of lands held of the King ut de honore was no longer to be invalidated as against the purchaser, and forfeiture for aliening any lands so held of the King was now abolished.

By the statute 34 Edw. 3, c. 15, it was enacted: "That the alienations of lands and tenements made by people which did hold of King Henry, great grandfather to the King that now is, or of other Kings before him, to hold of themselves, that the alienations shall stand in their force; saving always to our lord the King his prerogative of the time of his grandfather, his father, and of his own time." The construction of this provision is of great importance in relation to the issue now in question. It may mean only that the subinfeudations in and before the reign of Henry III. were validated, the words "to hold of themselves" being merely descriptive. Or on the other hand it may mean that as from the end of Henry III.'s reign, alienations by the King's tenants to hold of themselves were no longer to be regarded as permissible, the King having by his prerogative the right to impose such a term as the condition of granting his licence as to service lands, and the effect of the second provision of Quia Emptores above referred to being as above suggested.

I will now refer to the reasons which lead me to think that the Prerogative Ordinance dates from early in the reign of Edward I.

First. By a petition of grievances of the commons of England in the twenty-ninth year of the reign of Edward III. —i.e., 1355, and which is to be found in Rotuli Parlia-

mentorum, vol. ii., p. 265, the following appears: "Also whereas sheriffs, escheators and other ministers of our said lord the King, by colour of their offices, cause to be seized into the hand of the King lands and tenements held of the King in chief, because they find by inquisitions taken of their offices that those lands and tenements were alienated in the time of King Henry, great grandfather of our said lord the King or before without his licence. And whereas by the prerogative of the King made in the time of King Edward the grandfather, that law began to the profit of the King, [the commons pray] that those who now are tenants of the lands and tenements so alienated and purchased from so long ago, may not be henceforth impeached." This fixes the date of De Prerogativa Regis as in the time of Edward I.

Secondly. The statute 34 Edw. 3, c. 15, fixes the same period.

Thirdly. According to a statement in *Whistler's Case* (1) Mowbray C.J. in a year-book case 43 Edw. 3. 22A. stated this as a fact.

The last statute which need be mentioned is 12 Car. 2, c. 24. This is extremely difficult to construe. Mr. Challis in his Law of Real Property, 3rd ed., p. 23, says that it is loosely drawn and that "its language is marked by an iteration, always inept and sometimes perversely maladroit." I adopt the views and language of Mr. Challis, as to what it enacted so far as relevant to the case before me, which are as follows: "By it (1.) the Court of Wards and Liveries is abolished, and the burdensome incidents of Knight-service and of socage in capite, including fines for alienations, are discharged as from 24th February, 1645, since which date the Court of Wards and Liveries had ceased to hold sittings; (2.) all tenures, whether of the King or of any person or corporation, are turned into free and common socage as from the same day; (3.) all conveyances and devises of any hereditaments made since the same day are to be expounded as if the same hereditaments had been then held in free and common socage; (4.) certain statutes passed for the establishment and

(1) 10 Rep. 63A, 64A.

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regulation of the abolished Court are repealed ; (5.) all tenures thenceforward to be created are to be and to be adjudged free and common socage only (ss. 1–4). The savings out of the Act require more particular mention. 1. The Act does not take away rents certain, heriots or suits of Court belonging or incident to any former tenure now taken away or altered by virtue of this Act, or other services incident to tenure in common socage, or the fealty and distresses incident thereunto (s. 5). 2. The Act does not take away fines for alienation due by particular customs of particular manors and places, other than fines for alienation of lands or tenements holden immediately of the King in capite (s. 6). 3. The Act does not take away tenures in frankalmoigne, or subject them to any greater or other services than they then were subject to ; nor does it alter or change any tenure by copy of court-roll or any services incident thereunto ; nor does it take away the *honorary services* of grand serjeanty (s. 7). But there is no saving of the last mentioned *tenure*. . . . . By the conversion of all lay frank-tenements into socage tenements, it followed that every freehold tenant acquired the right to devise all lands held by him for a fee simple, which right had been given by the Statutes of Wills, 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5, only partially to tenants by knight-service, but completely to tenants in socage."

If a tenant of the King in capite had at this date any right to subinfeudate, it is difficult to find anything in this statute to take it away from him, nor has any authority for this proposition been cited to me, though this difficulty may arise from the manner in which the statute is drafted.

The Crown argument on this point is as follows : The statute turned all tenures in capite into tenures in free and common socage and brought the lands under the operation of the statute Quia Emptores. The enactment, as has often been pointed out, is very badly drawn, inasmuch as it seems to proceed upon the notion that a tenure in free and common socage (into which it turns all other tenures) would if the lands were held of the King direct be something other than a tenure in capite of the King (which tenure the Act purports

to abolish). It had, however, long been usual (see Co. Litt., 108A) to use the words "in capite" to distinguish tenures of the King in right of his Crown or ut de corona from tenures of the King where he had become possessed of the lordship by acquisition from a subject (tenures ut de honore), and in the case of the latter the King was in no better position than the lord he succeeded and the tenants were within Quia Emptores. This gives a clue to the intention of 12 Car. 2, c. 24, which was to turn all tenures of the King into tenures of the King in free and common socage on the same footing as if the King were a subject—i.e., tenures ut de honore. No other interpretation can give any effect to the abolition of the tenures "by socage in capite from the King" which is expressly enacted in the statute.

This contention, very clearly set forth by the Attorney-General as an alternative to his argument on the earlier statutes, may or may not be correct, but I do not think that it is necessary for me, having regard to the views I have formed on the other part of the case, to express any further opinion upon it, as to do so would occupy considerable time.

In Williams on Real Property, 20th ed. (1906), p. 55 [23rd ed., 1920, p. 57], the author, after referring to this statute, says (1): "When an escheat occurs, the Crown most frequently obtains the lands escheated, in consequence of the before-mentioned rule, that the King is the lord paramount of all the lands in the Kingdom. But if there should be any lord of a manor or other person, who could prove that the estate so terminated was held of him, he, and not the Crown, would be entitled. In former times there were many such mesne or intermediate lords, as we have seen. But now the fruits and incidents of tenure of estate in fee simple are so few and rare, that many such estates are considered as held directly of the Crown, for want of proof as to who is the intermediate lord; and the difficulty of proof is increased by the fact before-mentioned, that, since the statute of Quia

(1) This passage is by Joshua Williams: see 13th ed., 1880, p. 128. The variations are immaterial.

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Emptores, passed in the reign of Edward I., it has not been lawful to create a tenure of an estate in fee simple; so that every lordship or seignory of an estate in fee simple bears date at least as far back as that reign"; then the learned author adds (1): "to this rule the few seignories which may have been subsequently created by the King's tenants in capite form the only exception." The last sentence in this passage seems to be in favour of the petitioner as to the effect of the earlier statutes, if it is accurate; unless it is assumed to refer only, as I think it did, to seignories created by tenants in capite of the King, by his licence or charter. As to this, on p. 39 of the 20th ed. [23rd ed., p. 40] the editor says (2): "By the statute 18 Edw. 1, c. 1, called from its opening words the statute of Quia Emptores, liberty was given to every free man, who was a tenant in fee simple of land, to sell his holding or part thereof at will, so nevertheless that the alienee should hold the land of the same immediate lord and by the same services as the alienor held it before. Thenceforward it has been impossible to create a new tenure upon the grant of a fee; for a tenant in fee simple, though enabled freely to part with his land by substituting another tenant in his place, is by this statute restrained from granting his land or any part thereof to another for an estate in fee simple to be held of himself." The footnote states that: "The statute was not construed as giving to the King's tenants in capite liberty of alienation without his licence; a liberty, which they were afterwards allowed, subject to the payment of a fine: 1 Edw. 3, st. 2, c. 12; Co. Litt. 43." At p. 44 of the 20th edition [23rd ed., p. 45] the editor says (3): "Thus arose the estates, which are now called manors, and to each of which, according to later law, there is necessarily incident a court baron (that is, a lord's court wherein the freeholders are both suitors and judges), and at least two free tenants to act for this purpose. And every one of these estates is of a

(1) 13th ed., p. 128.

(2) This passage is by Mr. Cyprian Williams. Compare, however, the 13th ed., p. 63.

(3) This passage is by Mr. Cyprian Williams, but the concluding sentence appears in the 13th ed., p. 120.

date prior to the Statute of Quia Emptores, except, perhaps, some which may have been created by the King's tenants in capite with licence from the Crown."

With regard to the effect of these earlier statutes, much light is thrown upon them by other learned commentators and two decisions, which I will now refer to.

Sir William Blackstone says: "But these provisions, not extending to the King's own tenants in capite, the like law concerning them is declared by the statutes of prerogativa regis, 17 Edw. 2, c. 6, and of 34 Edw. 3, c. 15, by which last all subinfeudations, previous to the reign of King Edward I., were confirmed: but all subsequent to that period were left open to the King's prerogative. And from hence it is clear, that all manors existing at this day must have existed as early as King Edward I.; for it is essential to a manor, that there be tenants who hold of the lord; and, by the operation of these statutes, no tenant in capite since the accession of that prince, and no tenant of a common lord since the statute of Quia Emptores, could create any new tenants to hold of himself." I read that quotation from the 1811 ed., p. 91, which contains Mr. Archbold's notes. (1) On p. 289 of the same volume Sir William Blackstone says: "By the great charter of Henry III., no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one-half or moiety of the land. But these restrictions were in general removed by the Statute of Quia Emptores, whereby all persons, except the King's tenants in capite, were left at liberty to aliene all or any part of their lands at their own discretion. And even these tenants in capite were, by the statute 1 Edw. 3, c. 12, permitted to aliene on paying a fine to the King."

The view of this learned author apparently was that Quia Emptores did not enable the King's tenants in capite to aliene at their own discretion, the provision of the statute

(1) The passage also appears in the 8th ed., 1778, published in Blackstone's lifetime. The first sentence does not occur in the original edition.

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in that respect not applying to them; but he thought that since that statute and that of 34 Edw. 3, no tenant in capite of the Crown could thenceforth subinfeudate or create new tenants to hold of himself.

In Wright's Tenures, 1st ed. (1730), p. 162, it is said that Quia Emptores did not extend to the King or to his tenants in capite, but left them as they stood at common law till De Prerogativa Regis (treating that ordinance as passed later), after which in practice alienations by the King's tenants practically only took place by licence. This view does not really or necessarily conflict with Sir William Blackstone's opinion.

In Scriven on Copyholds, 7th ed., p. 332, it is stated without qualification thus: "Since the statute of Quia Emptores, 18 Edw. 1, the services rendered by a copyholder to the lord cannot be reserved on an enfranchisement at the common law; but after enfranchisement—the estate will become frank-fee, and be held of the superior lord; and any rents purporting to be reserved will be rents upon contract or by way of rentcharge and not of rent service. Similarly, and for the same reason, the right of escheat cannot be reserved to the enfranchising lord, upon a common law enfranchisement."

In a note to *Rex* v. *Wilson* (1) Serjeant Manning said: "It seems also to be questionable whether, as the language of the statute De Prerogativa Regis is 'qui tenet de Rege in capite per servicium militare,' its provisions are not become inoperative by the abolition of military tenures. If so, then inasmuch as the statute of Quia Emptores does not extend to lands holden in capite, ... it will follow that a freeholder holding in capite may at this day, without licence, make a sub-infeoffment or grant land in fee simple to be holden of himself, as he undoubtedly may do with the licence of the crown, under the express provisions of the statute De Prerogativa Regis, if the land be holden in capite, or with the licence of the lords mediate and immediate, under the implied, or, as Lord Coke calls it, the tacit exception in the

(1) 5 Man. & Ry. 140, 156.

statute of Quia Emptores, where the lands are holden of a subject."

This view is that for which the petitioner contends, but I am not satisfied that it is accurate or quite consistent in itself.

In Pollock and Maitland's learned work on the History of English Law, 2nd ed., vol. 1, p. 337, it is stated, speaking of Quia Emptores: "The statute is a compromise; the great lords had to concede to their tenants a full liberty of alienation by way of substitution—substitution even of many tenants for one tenant—and thus incur a danger of losing their services by the process of apportionment; on the other hand, subinfeudation with its consequent depreciation of escheats, wardships and marriages was stopped. Nothing was said about the King's rights and no one seems to have imagined that the tenants in chief of the Crown were set free to alienate without royal licence; on the contrary, it is just at the moment when all other tenants are gaining perfect freedom, that the King's claim to restrain any and every alienation by his tenants in chief attains its full amplitude." Then there is a note: "To treat this measure as having been passed in the interest of the great lords seems a mistake. The one person who had all to gain and nothing to lose by the new law was the King." There is nothing in the view here expressed contrary to the suggestion previously referred to as to the effect of the second provision of Quia Emptores above quoted.

Perhaps the clearest expression of views as to the effect of these early statutes upon the question I am called upon to decide is that of Mr. Challis. I read from the 3rd ed., at pp. 20 to 22. Speaking of Quia Emptores the author says: "This statute did not exempt the tenants of the Crown in capite from the necessity of procuring the King's licence to alienate, because the King's rights, he not being specially named, are not affected by the statute (Co. Litt. 43*b*). Therefore, (1.) if the tenant in capite aliened without licence, the Crown could distrain for a fine upon the land (Fitzh. N. B. 175A); and, (2.) upon such unlicensed alienation, the services were not apportioned, but the Crown could distrain upon any of the tenants for the whole services (Ibid. 235A). The King's

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right to the fine seems to have been derived from Magna Carta, cap. 32 (Co. Litt. 43*b*). Blackstone seems to have thought that the statute did not extend to the tenants of the Crown in capite, in the sense that they might subsequently create de novo a tenure in fee simple to be holden of themselves (2 Bl. Comm. 91). But it is perhaps uncertain whether he adverted to the distinction between the different senses which the words 'extend to' may bear. The statute has two aspects, one in so far as it enables the tenant to alienate, the other in so far as it disables him from creating de novo a tenure in fee simple to be held of himself. The statute did not enable the tenants in capite to alienate as against the Crown; and in this sense it may be said that the statute did not 'extend to' the tenants in capite, though it would be more strictly correct to say, that the statute did not extend to the Crown. This proposition is, in fact, the import of the passages cited in the last preceding paragraph from Fitzherbert. But it does not follow that the statute did not extend to the tenants in capite, meaning thereby that it failed to restrain them from creating de novo a tenure in fee simple. The question seems to be at this day of no practical importance; for Blackstone held that in any case the effect of the statutes 17 Edw. 2, De Prerogativa Regis, c. 6, and 34 Edw. 3, c. 15, is to invalidate all subinfeudations by the tenants in capite of later date than the commencement of the reign of Edw. I. The inference may, perhaps, be too hasty that 'all manors existing at this day must have existed as early as King Edward the first' (2 Bl. Comm., 92). Charters have been granted by the Crown, and confirmed by parliament, empowering subjects to create manors since that date; of which an example is to be found in the case of *Delacherois* v. *Delacherois*. (1) In that case the land to which the charter had reference was in Ireland, and the confirmation was of course by the Irish Parliament. There can be no doubt that, if aided by the confirmation of the English or British Parliament, a charter authorizing the creation de novo of manors in England would be valid. Nor is it at

(1) (1864) 11 H. L. C. 62.

all clear that such confirmation is necessary. Lord Coke expressly affirms, that the statute may be dispensed with, by consent of the Crown and all the mesne lords (Co. Litt. 98 b; 2 Inst. 501). The practical result of the partial restraint upon alienation imposed by Magna Carta c. 32, was, that lords exacted a fine upon alienation as the price of their consent, without which their tenants could not make a safe title. The right to such fines was abolished, so far as the tenants of common persons are concerned, by the Statute of Quia Emptores. But, as above mentioned, the tenants of the Crown in capite acquired by the statute of Quia Emptores no rights as against the Crown; and therefore fines upon alienation continued to be due from the tenants in capite, until expressly abolished by 12 Car. 2, c. 24. . . . . It is the general effect of the Statute of Quia Emptores, so often as a mesne tenure for a fee simple is extinguished by union of the land and the lordship in the same hands, to prevent the mesne tenure from being ever again revived by any act of the parties. Thus, by the gradual extinction of the mesne tenures, the seignory of all freehold lands held for a fee simple tends to become concentrated in the Crown."

The result of this view is that by virtue of Quia Emptores or 34 Edw. 3, or both, subinfeudation by tenants in capite of the Crown became illegal after the time of Henry III., or 18 Edw. 1, and the learned writer last quoted inclines to the latter date.

As bearing upon and supporting this view, it is significant that, if this opinion is unsound, the Crown, at a time when its powers were great, would have suffered and continued to suffer all the loss and inconvenience that the mesne lords prevented, in their own case, by the success which attended their efforts when Quia Emptores became law on their insistence.

Stanford's Exposition of the Prerogative written in 1548 is said to be contrary to Mr. Challis's views as to the true construction of Quia Emptores—but I am not satisfied from the passages to which I have been referred that this is really so—especially as he bases himself partly on the view that the

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Prerogative ordinance followed instead of preceding Quia Emptores.

The petitioner referred to *Doe* v. *Huntington* (1) for the purpose of showing that a so-called enfranchisement deed in (1672) 24 Car. 2, under which the alienee was to hold of the grantor lord, was not questioned as to its validity by the Court before whom it came, but the issue which the Court had there to decide did not turn upon any question between the lord and the alienee, and the only point in fact decided was that the grantee under the deed held thenceforth in free and common socage and had a power in consequence to devise his land by will.

In the learned and exhaustive report of Lord Redesdale's Committee on the Dignity of a Peer, vol. 1, p. 399, the view contended for by the Crown is adopted in the following passage: "This Statute has been supposed not to extend to lands holden of the King in chief as of his Crown; but by the 34th of Edw. 3, c. 15, it was declared that Alienations of Lands made by people who held of Henry the Third, or of other Kings before him, to hold of themselves, should stand in force; saving always to the King, his Prerogative of the Time of his grandfather and father, (that is, of Edward the First and of Edward the Second) and of his own Time; a declaration from which it may be inferred, that doubts had arisen whether subinfeudations made by tenants in chief of the Crown, prior to the reign of Edward the First, were good against the Crown; a doubt which may have arisen in consequence of the Statute of Edward the First having avoided subsequent subinfeudations as such, and made them alienations of the land to hold immediately of the Crown, and subject to all the services, if the Alienation should be of the whole land, and to a proportion of the services, if part only should be aliened, and therefore subject to forfeiture if made without licence; and it is evident, from the Terms of this Statute, that it was then at least doubtful how the law stood in the reign of Henry the Third."

I now turn to two decisions bearing upon the question before

(1) 4 East, 271.

me. The first is *Bradshaw* v. *Lawson*. (1) The headnote is "If the lord of a manor convey a customary estate to the tenant, he cannot reserve to himself the ancient services: for the tenant, by reason of the Statute Quia Emptores, must then hold of the superior lord." This was an action for debt, to recover 2*s*. 6*d*.; in which sum the defendant had been amerced for not attending, in respect of a customary estate, a court baron held for the manor of Halton, of which the plaintiff was lord. The special case then stated the facts, and Lord Kenyon C.J. said, in giving the leading judgment: "Notwithstanding all the industry that has been exerted on this occasion, I cannot entertain a doubt on the principal question, which was settled about five centuries ago by a positive Act of Parliament, the Statute of Quia Emptores. And the objection to the plaintiff's claim, which arises on this statute, decides the merits of the cause." Then a little lower down he says: "After the Statute of Quia Emptores the lord could not by any deed reserve the old services, when he conveyed away the estate in respect of which those services were due; for the tenant must hold of the superior lord." Ashhurst, Buller and Grose JJ. assented.

The report of this case is most unsatisfactory. No evidence appears to have been given as to the tenure of the manor therein discussed, whether it was held of the Crown or not, and if so whether it was held ut de corona or ut de honore. If it was not a manor held of the Crown or if it was one held of the Crown ut de honore, the decision, as it was, must have gone as of course, but a strong Court of King's Bench laid down generally and without qualification that after Quia Emptores subinfeudation could not take place, and I do not think that in this Court I am entitled to question the propriety of this decision, and I would observe that it is in harmony with the views of eminent writers whom I have referred to.

The petitioner contends that the real point arising on this petition was neither raised nor decided in that case, and that the manor therein referred to was probably held ut de honore, but I do not think that I am at liberty to assume

(1) 4 T. R. 443, 445.

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that the members of the Court of King's Bench, when using the general and unqualified language that appears in the judgments and in no way basing their opinion upon any such point as above suggested, were not alive to the distinction between manors held of the Crown ut de corona and those held ut de honore.

In an earlier case of *Chetwode* v. *Crew* (1) the Court of Common Pleas, according to a note of Abney J., a member of the Court, held, in a case where a lord of a manor had conveyed part of the demesne of the manor to tenants and their heirs to hold of himself by fealty and suit of Court, that no such tenure could be created at that date. The same remarks apply in all respects to that case and decision.

If the point now in issue had been res integra, I should have dealt with and discussed in greater detail the able and exhaustive arguments which have been addressed to me by the learned counsel for the petitioner and the Crown, especially with regard to the language and true construction of the statutes Quia Emptores, 34 Edw. 3, and 12 Car. 2. I am very conscious of the great assistance rendered me throughout the case and I am much indebted to counsel for their help, but I do not think that in this Court it is necessary for me further to elaborate the grounds for the decision at which I have arrived, which is that, having regard to the general terms in which the judgments in *Bradshaw* v. *Lawson* (2) and *Chetwode* v. *Crew* (1) are expressed, and to the views held, more particularly by Sir W. Blackstone, Mr. Scriven, Lord Redesdale's Committee, Messrs. Pollock and Maitland and Mr. Challis, which I have referred to, some of whom set forth the grounds on which those judgments may be supported, the Crown is entitled to succeed in the present case, and that this petition must be dismissed.

Micklem K.C. I ask for leave to appeal, if an appeal lies.

Sir Ernest Pollock A.-G. I do not oppose that conditional leave. As to costs, the Crown is treated as the plaintiff and the traverser as the defendant. The Crown is therefore

(1) Willes, 614, 619. (2) 4 T. R. 443.

entitled to costs under the Crown Suits Act, 1855 (18 & 19 Vict. c. 90), s. 1: Robertson on Civil Proceedings, pp. 439, 621, 673.

Micklem K.C. I cannot resist costs, if asked for.

ASTBURY J. Then there will be leave to appeal if an appeal lies, and the costs must follow the event.

Solicitors: *Dawson & Co.; Treasury Solicitor.*

G. R. A.

In re ANGLO-CONTINENTAL SUPPLY COMPANY, LIMITED.

[00185 of 1922.]

Company—Scheme of Arrangement—Reconstruction—Sale for Shares in Foreign Company—Jurisdiction under Arrangement Section—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 120.

The reconstruction of an existing company by winding up and sale of its entire undertaking and assets for shares in a new foreign company, though quite outside the scope of a reconstruction under s. 192 of the Companies (Consolidation) Act, 1908, may be effected as an arrangement under s. 120.

Jurisdiction and duty of the Court under s. 120 explained.

Observations of Younger J. in *In re Guardian Assurance Co.* [1917] 1 Ch. 431, 441 on the limited scope of the arrangement section, commented on.

PETITION to sanction scheme of arrangement.

The above-named company was incorporated in 1910 as a company limited by shares. Its office was in London, but its business of tea, provision and furniture dealers was entirely in France, where the holders of the majority of the shares resided.

The capital was 1,600,000*l.* sterling divided into 160,000 preference shares of 5*l.* each and 160,000 ordinary shares of 5*l.* each which were all issued and fully paid.

The rights of the preference shares were not fixed by the memorandum, but under the articles they were entitled to a

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cumulative 8 per cent. dividend and to priority for their capital and arrears of dividends in a winding up and no more. No debentures or debenture stock had been issued.

The company was making substantial profits in France, but owing to the fall of the franc, its floating capital expressed in sterling had depreciated to such an extent that it could pay no dividends.

A scheme of arrangement was therefore prepared under s. 120 of the Companies (Consolidation) Act, 1908, which provided that if and when it was sanctioned by the Court the company should go into voluntary liquidation and transfer the balance of its undertaking and assets to a new French company with similar objects to be formed in accordance with French laws as a société anonyme with a large preference and ordinary share capital to be distributed according to the scheme by way of consideration for the transfer. The French company was also to take over the balance of the liabilities unpaid by the liquidation.

The capital was to consist of 160,000 8 per cent. participating cumulative preference shares of 125 francs each; 20,000 8 per cent. participating ordinary shares of 125 francs each; 12,000 similar ordinary shares of 125 francs each guaranteed to be paid in cash, and 160,000 founders' shares of no nominal value.

The preference shareholders were to have the preference shares and a cash payment of 10 francs a share. The ordinary shareholders were to have the 20,000 ordinary shares and the founders' shares.

The balance of profits after paying 5 per cent. to a reserve fund until it reached one tenth of the capital, and after paying the 8 per cent. dividends free of French tax and paying 5 per cent. to the directors was to go as to 40 per cent. to the preference shareholders, 10 per cent. to the ordinary shareholders and 50 per cent. to the holders of founders' shares.

In a winding up the preference shareholders were entitled in priority to receive 5*l.* sterling per share at the current rate of exchange and all arrears of dividends. The ordinary shareholders were then to receive 125 francs per share. Five

per cent. of the surplus was then to go to the preference shares and the balance was to go as to one-sixth to the ordinary and five-sixths to the founders' shares.

Provision was made for dissentients on the lines of, but not exactly corresponding with, s. 192.

On April 24, 1922, separate class meetings of the preference and ordinary shareholders were held, pursuant to an order of April 4, and the scheme was approved by the requisite majorities.

On May 23, 1922, the company presented this petition for sanction.

At the hearing the scheme was opposed by some of the dissentient preference shareholders both on the merits and the jurisdiction. On the merits they contended that the scheme did not make fair and reasonable provision for them, but on the company agreeing to allow them the full rights of dissentients under s. 192 this objection was withdrawn. On the second point they submitted that the Court had no jurisdiction under s. 120 to sanction a scheme for a liquidation and sale of the entire undertaking for shares in a foreign company.

Maugham K.C. and *J. B. Lindon* for the company. As this is a sale to a foreign company it could not have been carried through under s. 192: *Thomas* v. *United Butter Companies of France* (1), where *In re Irrigation Co. of France* (2) is distinguished and the slip in s. 285 (Definitions) of the 1908 Act is pointed out: see Palmer's Company Precedents, 11th ed., pt. i., p. 1439.

But we have made full provision for dissentients and the Court has therefore full jurisdiction under s. 120: *In re Sandwell Park Colliery Co.* (3), recognized as sound in *In re Guardian Assurance Co.* (4)

Tomlin K.C. and *F. K. Archer* for the dissentients. The exact force and limitations of s. 120 are clearly and exhaustively pointed out by Younger J. in *In re Guardian Assurance*

(1) [1909] 2 Ch. 484, 490.
(2) (1871) L. R. 6 Ch. 176, 192.
(3) [1914] 1 Ch. 589.
(4) [1917] 1 Ch. 431, 441.

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Co. (1) His decision was overruled on another point not affecting those views. Sect. 120 does not give the Court unlimited jurisdiction to sanction any sort of scheme it likes. It does not mention the word " scheme " at all. It is a purely ancillary section in aid of the other provisions of the Act. It merely enables the Court to bind a dissentient minority to allow something to be done, which with their consent could be done under those other provisions, e.g., a reduction under ss. 46–50 : *In re Cooper, Cooper & Johnson* (2), or a reconstruction involving a sale for shares and distribution under s. 192 : *In re General Motor Cab Co.* (3) explained by Warrington L.J. in *In re Guardian Assurance Co.* (4)

Now the sale of a company's entire undertaking for shares in another company and division of the proceeds cannot be a corporate object. It can only be effected in a liquidation under the powers of s. 192 (formerly s. 161) : *Bisgood* v. *Henderson's Transvaal Estates.* (5)

In the present case the sale is to a foreign company, a sale, which, even with the consent of all the shareholders, could not have been made under s. 192, even if its provisions had been complied with : *Thomas* v. *United Butter Companies of France.* (6) How can the Court's jurisdiction to force an intra vires scheme on a dissentient minority enable it to sanction a scheme that is wholly ultra vires the entire company ?

[ASTBURY J. Since *In re Schweppes, Ld.* (7), it has been the practice to sanction any fair scheme under s. 120.]

That was not a sale for shares. It was an ordinary reorganization of capital, and the only decision was that it did not in fact modify the memorandum rights within s. 45. Its far-reaching effect on the practice was never contemplated.

No doubt where the jurisdiction under s. 192 exists, the Court is often satisfied with a substantial compliance with its provisions, such as a proper provision for dissentients,

(1) [1917] 1 Ch. 431, 441.
(2) [1902] W. N. 199.
(3) [1913] 1 Ch. 377.
(4) [1917] 1 Ch. 450.
(5) [1908] 1 Ch. 743, 761, 762.
(6) [1909] 2 Ch. 484, 490.
(7) [1914] 1 Ch. 322.

without insisting on a special resolution, though this omission is questionable.

For instance, in the *Sandwell Park Case* (1) the special division of the proceeds required sanction under s. 120: *Griffith* v. *Paget* (2), and the dissentients were properly provided for.

In *In re Canning Jarrah Timber Co.* (*Western Australia*) (3), there were special resolutions under the old s. 161, and the only matter ever in doubt was the underwriting resolution, which was withdrawn, and the absence of any provision for dissentients, which was remedied.

In *In re Tea Corporation* (4), the jurisdiction under s. 161 existed, but as the dissentients had no possible interest, no provision for them was necessary. In those cases the jurisdiction existed, even if not strictly complied with. In the present case it is simply non-existent.

Maugham K.C. in reply. The dissentients' argument is quite a quarter of a century too late, as whatever the Legislature originally intended by s. 120 and its predecessors s. 2 of the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), and s. 24 of the Companies Act, 1900 (63 & 64 Vict. c. 48), the Courts have always assumed jurisdiction thereunder to sanction schemes of this sort without recourse to s. 192 or its predecessor s. 161.

The practice under s. 120 will be found in Palmer's Company Precedents, 11th ed., pt. ii., pp. 982, 983, 984, 992; 12th ed., pp. 967, 968, 969, 977; and instances of schemes so sanctioned by Vaughan Williams J. in 1894, Wright J. in 1899, Byrne J. in 1903, and Swinfen Eady J. in 1911, are given in the same volume, 11th ed., pt. ii., pp. 1015, 1038, 1022, 1025; 12th ed., pt. ii., pp. 993, 1008, 1002, 1005.

Again in the 11th ed., pt. ii., p. 1043; 12th ed., pt. ii., p. 1015 it appears that a scheme involving a sale for foreign bonds—i.e., altogether outside s. 161—was sanctioned by Buckley J. in 1902. Lastly in 1920 a sale to a foreign company, again altogether

(1) [1914] 1 Ch. 589.
(2) (1877) 5 Ch. D. 894.
(3) [1900] 1 Ch. 708, 712, 715, 716, 717.
(4) [1904] 1 Ch. 12.

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outside s. 192, was propounded: loc. cit. 12th ed., p. 1009, long after *Thomas* v. *United Butter Companies of France.* (1)

[*Tomlin K.C.* These unreported schemes, presumably unopposed, are dubious authorities on a question of jurisdiction, probably not argued. It does not even appear that the last scheme was ever sanctioned.]

These schemes illustrate the practice since 1894 and coupled with the reported decisions show that ss. 120 and 192 are quite independent. The result may be stated in three propositions as follows:—

1. Where a scheme is exactly within s. 192, the provisions of that section cannot be evaded by calling it a scheme under s. 120: *In re General Motor Cab Co.* (2); *In re Guardian Assurance Co.* (3)

2. Where the scheme is only partly within s. 192 the Court has full jurisdiction to sanction it under s. 120 alone, and no resolution under s. 192 is necessary. It has merely to see that the scheme is fair. If as a matter of fairness it thinks that dissentients should have the protection of s. 192, it can make that protection a condition of its sanction: see the *Canning Jarrah Case* (4) and the *Sandwell Park Case.* (5) But that protection is not a matter of right: *In re Standard Exploration Co.* (6), referred to in Palmer, 11th ed., pt. ii., p. 993; 12th ed., p. 978; *In re Tea Corporation.* (7)

3. If, as in the present case, the scheme is altogether outside s. 192, proposition 2 applies a fortiori: see Palmer, pt. ii., 12th ed., pp. 1009, 1015.

There is nothing in these propositions to conflict with *Bisgood* v. *Henderson's Transvaal Estates* (8), which, pace the dicta, merely decided that a memorandum could not provide for a sale and distribution without regard to s. 161.

The Court has full jurisdiction under s. 120 alone and the scheme should be sanctioned.

Cur. adv. vult.

(1) [1909] 2 Ch. 484.
(2) [1913] 1 Ch. 377.
(3) [1917] 1 Ch. 431, 450.
(4) [1900] 1 Ch. 708.
(5) [1914] 1 Ch. 589.
(6) (1902) Times, March 21, p. 13*c*; March 26, p. 3*b*.
(7) [1904] 1 Ch. 12.
(8) [1908] 1 Ch. 743.

July 5. ASTBURY J. [after stating the facts]. On this petition coming on for hearing, the scheme was opposed by dissentient preference shareholders on two grounds—namely: (1.) that the scheme itself was not in the circumstances a fair and reasonable one to impose upon them; and (2.) that the Court had no jurisdiction to sanction it under s. 120.

These issues have been most ably and elaborately argued. Towards the close of the hearing the dissentients withdrew their opposition on the merits, on the company agreeing to amend the scheme so as to give dissentients in clear terms the safeguards of s. 192. The scheme as originally drawn was, I think, really intended and designed to give dissentients those safeguards, and I am of opinion that in the present case it is fair and reasonable that the amended provisions in this respect should be imposed by the Court as a condition of sanctioning the scheme under s. 120 if it has jurisdiction to do so, and the parties have agreed that this course should be taken. This leaves the dissentients' second point as to jurisdiction to be determined, and here again they have now withdrawn their opposition if the Court decides that it has jurisdiction to sanction the scheme.

As this is a question of the utmost importance, having regard to a long course of practice, and to the increasing necessity, especially in the present conditions of trade, of carrying through schemes of reconstruction, I propose to give my reasons for holding, as I do hold, that this scheme can and ought to be sanctioned.

I have carefully considered the evidence and the arguments addressed to me on the question whether the scheme as amended is a fair and reasonable one to impose upon those minority shareholders who have not voted in its favour, and I am clearly of opinion that it is.

On the question of jurisdiction under s. 120 the case stands thus: Under s. 161 of the Companies Act, 1862, a sale to a foreign company could be carried through: *In re Irrigation Co. of France* (1); but, under the corresponding s. 192

(1) L. R. 6 Ch. 176, 192.

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of the present Act, Eve J. has held that this cannot be done: *Thomas* v. *United Butter Companies of France* (1), because a foreign company is not a company registered under the Act as defined by s. 285. Whether this is a result of an oversight in framing the Act of 1908 I need not pause to consider.

Mr. Tomlin contends that a company has no power to sell its assets for shares to be distributed in and by means of a liquidation amongst its members except under the enabling powers contained in s. 192, which is now limited to cases where the transferee company is registered under the Act. He says that the Court cannot do alone under s. 120 that which necessitates the enabling aid of s. 192 and requires its safeguards to be observed. For this proposition he cites (inter alia) *In re General Motor Cab Co.* (2) The result of this contention is that, as a sale to a foreign company for shares can no longer be carried through by special resolution under s. 192, the Court cannot, under s. 120, deprived of the possibility of aid under s. 192, sanction any such scheme as the present one. In other words he says that both sections are required to enable a sale for and distribution of shares coupled with a rearrangement of rights by way of compromise, or arrangement with shareholders to be carried through, and that, as in the present case s. 192 cannot be called in aid, the scheme must fail. This argument is said to be assisted by *Bisgood* v. *Henderson's Transvaal Estates* (3), where it was decided that a sale for shares in and for the purposes of liquidation and distribution cannot be a corporate object. Mr. Tomlin further contends that s. 120 was not intended to override the necessity of complying with the provisions of other sections of the Act where they are applicable—e.g., when a scheme involves a reduction of capital within the meaning of the reduction sections; in which case those sections must be observed: *In re Cooper. Cooper & Johnson.* (4) This is no doubt right if limited to cases where other sections of the Act really apply, but as I hope to show,

(1) [1909.] 2 Ch. 484, 490.
(2) [1913] 1 Ch. 377.
(3) [1908] 1 Ch. 743, 761, 762.
(4) [1902] W. N. 199.

it does not go to the length that Mr. Tomlin contends for as regards s. 192.

In support of his main contention Mr. Tomlin relies on *In re Guardian Assurance Co.* (1), where Warrington L.J. said (2): "I may add that . . . . *In re General Motor Cab Co.* (3) does not touch the present case. In that case there was an attempt by means of what was called an arrangement between the company and its shareholders to do that which the Act only permitted to be done in another way." Mr. Tomlin also relies on the following observations of Younger J. in the Court below (4): "First of all, it is, I think, quite clear that s. 120 does not extend to all arrangements of the kind described by Mr. Clauson. Its relation to other sections of the Act—e.g., ss. 45 and 192—is, I think, plain. Its purpose is strictly limited: it does not confer powers; its only effect at any time is to supply, by recourse to the procedure thereby prescribed, the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity. The section accordingly has no application to an arrangement which is ultra vires the company, nor to an arrangement of a kind which can only be effected in a prescribed way—e.g., a reduction of capital, or a reconstruction under s. 192. If that which within Mr. Clauson's definition would be an arrangement is in fact nothing but a reduction of capital, the appropriate statutory procedure must be resorted to: *In re Cooper. Cooper & Johnson.* (5) Sect. 120 has no application. So, if it is a reconstruction, the procedure of s. 192 must be followed: see *In re General Motor Cab Co.* (3) It will, I think, be found on examination that there is nothing in *In re Canning Jarrah Timber Co.* (*Western Australia*) (6), nor in *In re Tea Corporation* (7), nor in *In re Sandwell Park Colliery Co.* (8), in conflict with this. In all these cases s. 192 was in

(1) [1917] 1 Ch. 431.
(2) [1917] 1 Ch. 450.
(3) [1913] 1 Ch. 377.
(4) [1917] 1 Ch. 441.
(5) [1902] W. N. 199.
(6) [1900] 1 Ch. 708.
(7) [1904] 1 Ch. 12.
(8) [1914] 1 Ch. 589.

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substance complied with in the sense that every one entitled to object that it was not either assented or was paid. And there are frequently cases in which an arrangement involves a reduction of capital, and also some alteration in the rights which cannot be effected by the reduction procedure per se. In such a case the requirements both of the reduction procedure and this section must be observed. So in the case of a reconstruction, when, for instance, it is desired in the scheme to escape from such a decision as that of *Griffith* v. *Paget*. (1) In such a case the requirements both of s. 192 and of this section must be followed. Take another instance of a so-called arrangement outside the section. The sale of the whole undertaking of a company for a consideration to be distributed amongst the members without liquidation is ultra vires the company: see *Bisgood* v. *Henderson's Transvaal Estates*. (2) To such an arrangement this section, even if complied with, would give no validity, because it would be void even if every individual shareholder agreed to it."

If I may respectfully say so, I agree with what I believe Younger J. intended to convey by these words, though I think some of his language may require explanation and modification with regard to cases not within his contemplation, as he was obviously not intending to convey that a large percentage of the earlier cases in the books where schemes had been sanctioned had been wrongly decided.

Mr. Tomlin next contends that the sanction in the *Canning Jarrah Case* (3) was really given under s. 161 of the 1862 Act combined with the compromise and arrangement sections of the Joint Stock Companies Arrangement Act, 1870; and he was compelled to submit that the decisions in *In re Tea Corporation* (4); *In re Standard Exploration Co.* (5) (referred to in Palmer, 11th ed., pt. ii., p. 993); and *In re Sandwell Park Colliery Co.* (6) were wrong. He finally contends that s. 120 does not enable those things to be done

(1) 5 Ch. D. 894.
(2) [1908] 1 Ch. 743.
(3) [1900] 1 Ch. 708.
(4) [1904] 1 Ch. 12.
(5) (1902) Times, March 21, p. 13*c*; March 26, p. 3*b*.
(6) [1914] 1 Ch. 589.

which would be otherwise ultra vires the company unless under other sections of the Act provision is expressly made for this purpose, in which case the requirements of those sections must be strictly observed.

The result of the dissentients' argument on the second issue therefore is that outside s. 192 a company cannot sell, except for cash, its undertaking in and for the purpose of liquidation and distribution of the proceeds, and that the Court under s. 120 cannot sanction any such proceeding unless the provisions of s. 192 apply and have been complied with.

The petitioner's counsel, Mr. Maugham, challenges the accuracy of these submissions and points out that s. 192 refers to what a company can do by special resolution unaided by the Court: that it refers only to the receipt of "Shares, policies, or other like interests," of and in the transferee company; and that many schemes have been sanctioned under s. 120 and previously under the Acts of 1862, 1870 and 1900 where other interests, as distinct from cash, have been taken in consideration of the transfer of the business and undertaking of the transferor company, and that many large and important business undertakings and interests would be seriously hampered and jeopardised if this were not permissible in circumstances approved of by the Court, and by the necessary majorities of the shareholders interested.

The provisions safeguarding the interests of dissentient shareholders provided for in s. 192 are not necessarily exacted when the Court sanctions a scheme under s. 120. They may or may not be insisted upon as a condition of that sanction according to what is considered fair and reasonable in each particular case. Even under the Joint Stock Companies Arrangement Act, 1870, and before the Companies Act, 1900, s. 24, schemes were sanctioned: see Palmer, 11th ed., pt. ii., pp. 1015 and 1038, where assets were to be sold for shares to be distributed, and the provisions of s. 161 of the Act of 1862 had not been complied with: and the judges, Vaughan Williams and Wright JJ., who sanctioned those

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schemes, cannot have agreed with the dissentients' contention that the Court is debarred from sanctioning schemes involving sales for shares, liquidation and distribution, without the assistance of a special resolution under s. 192 or its predecessor, s. 161.

I will now refer to a number of other schemes involving the above class of arrangements with shareholders and debenture holders which have been sanctioned under the Acts of 1862, 1870, 1900 and 1908, and where the provisions of neither s. 161 nor s. 192 have been complied with, or compliance therewith considered to be an essential factor. These will be found in pt. ii., 11th ed., of Sir Francis Palmer's work, pp. 1022, 1025, 1043 and 1048 to 1055. In a number of schemes sanctioned since the Act of 1908 came into operation, the transferee company, whose shares were taken in exchange, was a colonial company not registered in this country, and a number of schemes have also been recently sanctioned where a sale has been for shares in a foreign company outside the British dominions, as in the present case, and where the sanction was given after the decision in *Thomas* v. *United Butter Companies of France.* (1) One example of this will be found in pt. ii. of the 12th ed. of Palmer, p. 1009.

As a result of his researches, Mr. Maugham has formulated three propositions which, when expressed as follows, are in my judgment sound: 1. When a so-called scheme is really and truly a sale, etc., under s. 192 simpliciter, that section must be complied with and cannot be evaded by calling it a scheme of arrangement under s. 120: see per Warrington L.J. in *In re Guardian Assurance Co.* (2) 2. Where a scheme of arrangement cannot be carried through under s. 192, though it involves (inter alia) a sale to a company within that section for "shares, policies and other like interests," and for liquidation and distribution of the proceeds, the Court can sanction it under s. 120 if it is fair and reasonable in accordance with the principles upon which the Court acts in these cases, and it may, but only if it thinks fit, insist

(1) [1909] 2 Ch. 484, 490. (2) [1917] 1 Ch. 450.

as a term of its sanction on the dissentient shareholders being protected in manner similar to that provided for in s. 192. 3. Where a scheme of arrangement is one outside s. 192 entirely, the Court can also and a fortiori act as in proposition 2, subject to the conditions therein mentioned. Various schemes sanctioned by the Court and falling within the second and third of these propositions will be found in the pages of Sir Francis Palmer's book.

I will now refer shortly to the authorities cited by Mr. Tomlin in support of his argument, as well as to those which he specifically mentioned as having been wrongly decided according to his submission. If he is right in his contentions most of the schemes set out in the pages of Palmer to which I have referred must also be regarded as having been sanctioned wrongly or per incuriam: a burden which in my opinion he has not been able to sustain.

In the *Canning Jarrah Case* (1) the Court of Appeal sanctioned a scheme under the Act of 1870, which did not conform to the provisions of s. 161, insisting as a term of its sanction that dissentient safeguards similar to those provided for in that section should be inserted in the scheme. No valid resolution under s. 161 had been passed in that case.

In the *Tea Corporation Case* (2) the Court of Appeal sanctioned a scheme, wholly impossible under and beyond the scope of s. 161, under the Acts of 1862, 1870 and 1900, all three members of the Court holding that it had power to do so quite independently of s. 161. This is one of the cases in Mr. Tomlin's black list.

In *Bisgood* v. *Henderson's Transvaal Estates, Ld.* (3), the decision was limited to the proposition that a company cannot by its memorandum of association impose upon a minority of its shareholders a scheme under which such members must come under increased liability or be expropriated. This decision has no bearing upon the issue raised in the present petition.

(1) [1900] 1 Ch. 708. (2) [1904] 1 Ch. 12.
(3) [1908] 1 Ch. 743.

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The *General Motor Cab Case* (1) was a decision simply to the effect of proposition 1. The *Sandwell Park Case* (2) was decided in accordance with proposition 2.

In the *Guardian Assurance Case* (3) a scheme was sanctioned by the Court of Appeal involving a fusion between two companies without liquidation, shareholders in one of the two companies in question, while it continued to exist as a going concern, being subjected to expropriation for a consideration other than cash.

The *Standard Exploration Case* (4) is an instance of a decision in accordance with proposition 2 above mentioned where the dissentient safeguards under s. 161 were not insisted upon by the Court as a condition of its sanction.

These authorities do not in my judgment justify in any way the dissentients' contentions. On the contrary they, and the orders made in the other cases cited in Palmer, justify the three propositions above set out.

In exercising its power of sanction under s. 120 the Court will see: First, that the provisions of the statute have been complied with. Secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and, Thirdly, that the arrangement is such as a man of business would reasonably approve: see Buckley, 9th ed., p. 275, and the authorities there cited.

After carefully considering the evidence and arguments in the present case I am of opinion that these desiderata and conditions have been complied with and satisfied. I therefore, for the reasons I have given, sanction the scheme of arrangement in question subject to the modification as to the dissentient shareholders above referred to so as to be binding on all the holders of ordinary and preference shares of the company and also upon the company. The company

(1) [1913] 1 Ch. 377.
(2) [1914] 1 Ch. 589.
(3) [1917] 1 Ch. 431.
(4) (1902) Times, March 21, p. 13*c*; March 26, p. 3*b*.

has offered an undertaking not to part with the assets until the dissentients have been communicated with, and this I accept.

Solicitors: *Ashurst, Morris, Crisp & Co.; Kenneth Brown, Baker, Baker.*

G. R. A.

CHARLES SEMON AND COMPANY, LIMITED *v.* BRADFORD CORPORATION.

[1921. C. 4353.]

Ancient Lights—Obstruction—Business Premises—Woollen Merchants—Diminution of Light—Sufficiency left—Quia timet action—Onus of Proof—Measurement of Light.

The plaintiffs, who were stuff and woollen merchants at Bradford, had enjoyed for more than twenty years free and practically uninterrupted access of an exceptionally good light to their warehouse. The defendants proposed to erect a new building 73 feet high and separated from the plaintiffs' warehouse on the south by B street, 45 feet wide. On this frontage of the plaintiffs' warehouse there were thirty-six windows, six on the ground floor and on each of the five floors above it. The expert evidence was that, although the direct light to four of the windows on the ground floor and first floor directly opposite to the proposed new building would be intercepted to a very large extent, these rooms would still be well lighted, and no case was made out in respect of the other fourteen windows in B street alleged to be seriously affected. In a quia timet action by the plaintiffs to restrain the erection of the proposed building:—

Held, that inasmuch as the four rooms specially affected would still remain well lighted rooms, the warehouse would possess, on the evidence, an unusually large amount of light for the carrying on of the business having regard to its locality. The plaintiffs therefore had not established an actionable nuisance or the insufficiency of the light which remained, and no injunction would be granted.

ACTION with witnesses.

The plaintiffs were the owners and occupiers of freehold hereditaments known as 25, Bolton Road, in the city of Bradford on which was erected a warehouse used for the purpose of carrying on the business of stuff and woollen merchants. The land on which it was erected was owned by the defendants in 1876 and the warehouse was erected for the purpose of being

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used for the above-stated business in accordance with plans approved by the defendants. It had ever since been used for the purpose of carrying on the same business which, as the plaintiffs alleged, required rooms lighted by a strong north light for the purpose of perching and examining and matching cloth. The plaintiffs' warehouse was constructed with six floors containing thirty-six windows, six on each floor facing north on a street called Balme Street which was 45 feet wide.

The defendants were the owners of a piece of land on the other side of Balme Street opposite a portion of the plaintiffs' warehouse, and they threatened to erect a building 73 feet high which, as the plaintiffs alleged, would, if erected, seriously obstruct the free access of light to the windows in the plaintiffs' building. The plaintiffs claimed that uninterrupted and free access of light had been enjoyed by them and their predecessors for more than twenty years, and that the proposed building would render their warehouse unsuitable for the carrying on of their business and would be a nuisance to the plaintiffs.

They accordingly claimed an injunction to restrain the defendants from erecting on their land in Balme Street any building so as to darken, injure, or obstruct any of the ancient lights of the plaintiffs' warehouse in such a manner as to cause a nuisance or illegal obstruction to the plaintiffs' windows.

By their defence the defendants did not admit the allegations of the plaintiffs and in particular that the business of a stuff and woollen merchant required rooms lighted by a strong north light.

They stated that the proposed building on the north-west side of Balme Street would be directly opposite in part only to the warehouse, and would not, if erected, seriously or illegally obstruct the free access of light to the windows of the plaintiffs' warehouse or cause a nuisance, or render the warehouse unsuitable for the business there carried on. They further pleaded that it would, after the erection of the defendants' building, be well and sufficiently lighted for all ordinary purposes of occupancy as a place of business.

Evidence was given by witnesses on both sides, the chief expert witness for the plaintiffs being Sir Banister Fletcher and for the defendants Mr. Percy John Waldram. The evidence of the plaintiffs' witnesses was directed to the amount of light taken away from the ground-floor and first- and second-floor windows. The evidence for the defendants was chiefly as to the amount of light that would be left for the ground and first-floor windows and its sufficiency for the purposes of the defendants, but it was admitted that as to the four windows directly facing the proposed new building there would be interception of a very large percentage of the direct light. The particulars and result of the evidence sufficiently appear from the judgment of the Court.

Hughes K.C. and *C. A. Bennett* for the plaintiffs. If the proposed building is erected it will seriously interfere with the light coming to the eighteen windows on the ground floor and first and second floors of the plaintiffs' warehouse in Balme Street facing north. Before 1904 when *Colls* v. *Home and Colonial Stores* (1) was decided the plaintiffs would have been clearly entitled to an injunction, but notwithstanding that case the law still is that a man who has enjoyed light for twenty years is entitled to prevent his neighbour from taking away such a part of that light as will make his building substantially less convenient and beneficial for the purposes of his business. A north light is essential for the process of perching and examining cloth, and the north light which will be taken away is vital to the beneficial user of the building for the plaintiffs' purposes. Damages are no adequate remedy and we seek an injunction.

We admit that a right to a special light cannot be acquired by prescription, but we submit that if the defendants take away from the plaintiffs so much of their light as would render their premises less convenient for the purposes of their business, the plaintiffs are entitled to relief, and that it is not sufficient for the defendants to say that the plaintiffs will still have sufficient light, or that they will have as good a

(1) [1904] A. C. 179.

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light as other places. That view is borne out by Vaughan Williams L.J. in *Kine* v. *Jolly* (1) and by Romer L.J. (2) and Cozens-Hardy L.J. (3), and in *Jolly* v. *Kine* (4) by Lord Loreburn L.C. and Lord James of Hereford (5) and by Lord Lindley in *Colls' Case*. (6) Quite apart from the question of extraordinary user, the ordinary user of a Bradford warehouse of this description requires a good light, and the evidence in this case shows beyond doubt that the light coming to the plaintiffs' warehouse will be very substantially interfered with by the defendants' building. In *Foster* v. *Pickles* (7) the facts were much less strong than in the present case.

Cunliffe K.C., *Tomlin K.C.*, and *J. G. Wood* for the defendants. There is no right to any kind of special light either in quantity or quality in Bradford or any part of it, or for the trade carried on by the plaintiffs: *Ambler* v. *Gordon*. (8) Since *Colls' Case* (9) the real question by which these cases are tested is—What is the quantity of light left? *Kine* v. *Jolly* (10) shows that there is a standard, but the difficulty arises in applying it. A plaintiff has to show that light has been taken away and that what is left is not sufficient for the ordinary notions of mankind: *Higgins* v. *Betts*. (11) The element of nuisance existed in *Kine* v. *Jolly* (10), but the principles of that case do not differ from those in *Colls' Case*. (9) *Kine* v. *Jolly* (10) was discussed in *Paul* v. *Robson* (12), which supports our contention. *Foster* v. *Pickles* (7) was a plain case of very substantial interference. *Clarke* v. *Clark* (13) was approved in *Colls* v. *Home and Colonial Stores* (9) as good law. The standard of comfort was discussed in *Rushmer* v. *Polsue and Alfieri, Ld.* (14) The plaintiffs have failed to establish affirmatively that the light which is left is insufficient for the ordinary purposes of their business

(1) [1905] 1 Ch. 480, 493, 494.
(2) Ibid. 497.
(3) Ibid. 502.
(4) [1907] A. C. 1, 2.
(5) Ibid. 4.
(6) [1904] A. C. 179, 210.
(7) Unreported.
(8) [1905] 1 K. B. 417, 423.
(9) [1904] A. C. 179.
(10) [1905] 1 Ch. 480; [1907] A. C. 1.
(11) [1905] 2 Ch. 210.
(12) (1914) 30 Times L. R. 533.
(13) (1865) L. R. 1 Ch. 16.
(14) [1906] 1 Ch. 234; [1907] A. C. 121.

according to the standard of the locality, and the burden of proof is on them.

Hughes K.C. in reply. This is a quia timet action and we admit the onus is upon the plaintiffs to establish their case of an actionable nuisance: *Litchfield-Speer* v. *Queen Anne's Gate Syndicate* (*No.* 2), *Ld.* (1) There is a right of action if the plaintiffs establish that the light is rendered less efficient for the purposes of their business. The plaintiffs do not say that they have acquired a right to an extraordinary light, but they say that they have acquired an easement entitling them to a light which will enable them to carry on their business as effectively as hitherto. The Court has to take into consideration the relative importance of the light in question, and the evidence relating to the Bradford trade was adduced with that object. All the plaintiffs' most important light is on the north side, and the rooms there are used for a special purpose. *Clarke* v. *Clark* (2) was a case of a dwelling house, and not relevant to business premises, in which the ordinary occupations of life afford no criterion. This is not a special light but is a light required for one of the ordinary trades of Bradford.

On the question of damages, they must be estimated in respect of the whole of the plaintiffs' premises and not limited to the part affected: *Griffith* v. *Richard Clay & Sons, Ld.* (3)

Cur. adv. vult.

June 2. EVE J. The plaintiffs—successors in title to an old-established business in Bradford—are merchants engaged in the dress goods industry and owners in fee of a valuable warehouse situated at the junction of and having lengthy frontages to Bolton Road and Balme Street in the centre of the business part of the city. The frontage in Bolton Road faces east, that on Balme Street north, and there is a third frontage facing west on to a private road 24 feet wide. In each of these frontages there is a large number of windows

(1) [1919] 1 Ch. 407. (2) L. R. 1 Ch. 16.
(3) [1912] 2 Ch. 291.

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admitting light to the various floors of the warehouse. In the Balme Street frontage, with which alone this action is concerned, there are thirty-six windows, six on the ground floor and on each of the five floors above it.

On the evidence it is established that the plaintiffs' warehouse is and always has been since its erection in 1876 an exceptionally well lighted building—that is, well lighted above the average of similar buildings and for like businesses carried on in what has been spoken of as " the flat " or " the warehouse area " in Bradford. In particular the access of light from the horizon to all the windows in the Balme Street frontage has been practically uninterrupted, inasmuch as there has never been any obstruction opposite these windows higher than a hoarding enclosing the plot of vacant land upon which the defendants now contemplate erecting a building rising to a height of 73 feet above street level.

The plaintiffs allege that this building when erected will so materially diminish the access of light to their eighteen windows on the ground, first and second floors in Balme Street as substantially to detract from the beneficial use and occupation of their warehouse, and accordingly by this action —which is purely of a quia timet nature—they claim an injunction the effect of which, if granted, will be to prevent the defendants from completing the building already planned.

The defendants concede that their building, if erected, must intercept a very large percentage of the direct light reaching some few in number of the Balme Street windows, but they assert that there will be no interference with the beneficial use and occupation of the premises as a warehouse sufficient to entitle the plaintiffs to relief in the action.

The width of Balme Street between the two frontages is 45 feet, and the defendants' building will be co-terminous with the plaintiffs' premises for a distance of 21 feet 8 inches along Balme Street. As a result it is directly opposite the two most easterly windows on the ground and upper floors of the plaintiffs' warehouse. From these windows it will cut off on the ground floor 48 per cent. and 41 per cent., and on the first floor 41 per cent. and 33 per cent. of the direct

light heretofore reaching them. On both floors the angle of light to these windows taken at a right angle to their plane will be reduced to one considerably less than one of forty-five degrees.

I do not propose to deal with any windows other than these four. I very much doubt whether the plaintiffs on their own evidence made out any case in respect of the remaining fourteen windows, but, if they did, it was in my opinion completely disposed of by the defendants' witnesses. I think Sir Banister Fletcher—the plaintiffs' leading expert—made a perfectly proper admission when in answer to this question, referring to the four easterly windows on each floor: "What I am asking you to say is that with regard to these windows no reasonable man and certainly no distinguished professional man would go into the box and say they were seriously interfered with in such a way as to give in his opinion any right of complaint?" he replied: "I think it is quite likely." And again when at the very end of his cross-examination he was asked: "You do not really seriously suggest, do you, that on the second floor on that staircase there is going to be any ground of complaint with regard to light when the building is up?" and deliberately abstained from giving an affirmative answer, contenting himself with the observation: "I think it may well be a light staircase," he surely must be treated as assenting to the suggestion underlying the cross-examiner's interrogatory.

What then is the issue I have to try? It is this—will the erection of the defendants' building obstruct the access of light to all or any of the four easternmost windows—two on the ground floor and two on the first floor—of the plaintiffs' premises to such an extent as to render those premises substantially less convenient for beneficial use and occupation as a warehouse for the purposes of the plaintiffs' business?

The windows on the ground floor are glazed with thick hammered glass. This glass intercepts a very large percentage—evidence was given that it is as high as 80 per cent. —of the light reaching the external surface. The windows are also protected with iron grilles, and being so near street

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level they are a good deal splashed with mud thrown up by the passing traffic.

The area these two ground-floor windows light is the triangle of about 100 square feet formed by drawing an imaginary line from the pillar at the northern side of the slope down to the sample store room to the pillar on the western side of the second window. It is true that in Mr. Jackson's view some of the light coming through these windows would "filter further in"—that is, beyond the imaginary line, but substantially the triangle is the area lighted by these two windows.

The two corresponding windows on the first floor together with the next window to the west light an office some 15 or 16 feet in depth from front to rear and of a shape approaching that of a triangle.

I have already given particulars of the direct light which will be cut off from these four windows by the defendants' building ranging from 33 per cent. to 48 per cent.

Founding themselves mainly if not entirely on these figures and the consequential loss of sky area, the plaintiffs' witnesses have committed themselves to some very emphatic opinions as to the extent of the loss of light hitherto enjoyed by the plaintiffs likely to be caused by the defendants' building and the resultant condition from a lighting standpoint of the Balme Street end of the plaintiffs' premises.

Mr. Walter Jackson—a local architect and surveyor of many years' experience who has been advising the plaintiffs throughout—speaking of the ground floor generally and not confining himself to the part lighted by the two easternmost windows, says: "It"—that is the defendants' building when completed—"would very seriously diminish the light, it would make those rooms almost in semi-darkness for the purposes for which I think they are used. The first floor will be affected in a similar manner, but not so much; they will be working under difficulties; they will not be as efficient as they are now, it will materially diminish the light." And referring to the second floor he adds: "It will have the same effect there in a lesser degree, the light will not be

anything like as good as it is now." Mr. William Prest, a civil engineer and surveyor, also of considerable experience, says: "I think the erection of defendants' building will seriously diminish the light which comes to the ground floor, the first floor, and the second floor; above that I do not think it is material." And then finally there is Sir Banister Fletcher, to whose evidence as to the windows on the second floor and the eight westerly windows on the ground and first floors I have already alluded. His opinion as to the four surviving windows is thus expressed: "Generally speaking my opinion is that if the defendants' building is erected the two easterly windows on each floor"—he is referring there to ground, first and second floors—"will be seriously affected; speaking as to the ground floor I think it is a serious diminution, and taking the first floor, as the proposed building will subtend an angle of 50 degrees with the inside sill of the windows, I think it will be a serious diminution for the two easterly windows." So far I have dealt only with the opinions expressed by these witnesses in examination in chief, and from what I have already read it will be appreciated—as was demonstrated when they came to be cross-examined—that these opinions were based solely upon the quantum of light intercepted. No attempt was made by any one of them to ascertain how far the intercepted light would represent surplus above ordinary requirements, the interference with which would give no cause of action, nor did a single one of them make any experiment or institute any inquiry as to the amount of light which would survive, and still be enjoyed by the plaintiffs—a factor which cannot be omitted from an investigation the object of which is not to ascertain whether there will be a diminution of light but whether the diminution, whatever its magnitude, will be so great as to leave the plaintiffs' premises really less fit for the purposes of their business.

This defect in the plaintiffs' evidence largely discounts its value. The admitted sections establish beyond controversy a material interference with the direct light coming to each of the four windows under consideration, and no one doubts

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that the direct light reaching the front of each of these windows must be greatly reduced; but if in fact the reduction is represented by surplus light and if, notwithstanding the reduction, there remains a sufficiency of light for the plaintiffs they do not establish an actionable nuisance simply by proving that the reduction is large.

This is an aspect of the case which was not dealt with by and indeed does not seem to have presented itself to any of the plaintiffs' witnesses. They appear to have assumed throughout that so substantial an interference with direct light as is evidenced by one of the exhibits could not co-exist with a continuing sufficiency for all reasonable requirements.

In a case of this sort when the offending building is not in existence and where, therefore, much must of necessity be left to estimate or even guesswork, it would not be fair to attach too much importance to exaggerated estimates of apprehended consequences, but I cannot help saying that the rather extravagant views expressed on behalf of the plaintiffs as regards parts of their premises not really affected by the defendants' building detract to some extent from the weight to be attached to opinions expressed about the relevant parts.

I think it may be questioned whether the plaintiffs when they closed their case had discharged the onus which rested on them of proving that the defendants were threatening and intending to take away so much of their light as to leave them less than is required for the beneficial use of their warehouse for the purposes of their business. But even if the plaintiffs raised a prima facie case of an actionable interference I think it was rebutted by the evidence given on behalf of the defendants. In particular I rely upon Mr. P. J. Waldram, whose testimony was given with commendable impartiality and with great lucidity. It appears therefrom that in recent years a great advance has been made in the study of light problems, and although no standards have been fixed determining the minimum amount of light reasonably necessary for particular industries, certain conclusions have been arrived at from which it is possible to ascertain the quantitative

value of the light in a room under varying conditions of obstruction. It has been established that the ratio of the light at any given point in a room to the sill light is constant, the sill light being the light available at the outside sill of the window from an unobstructed horizon. The sill light must of course vary with the atmospheric conditions outside, but whatever the variations may be the percentages in the various parts of the room of the inside illumination to the sill light remain constant. This percentage is spoken of as the daylight factor. It is remarkable how small a percentage of the available sill light penetrates into the room, but the data to which I have referred enable standards to be fixed below which the daylight factor ought not to be allowed to fall having regard to the purposes for which the light is required. Upon this subject public elementary schools have received far more attention than any other form of building both in this and every other civilized country, and much labour extending over many years has been expended in arriving at the proper minimum illumination of a room wherein young children have to work in circumstances somewhat novel to them. The result is that there is a consensus of expert opinion that if the worst lighted desk receives 1 per cent. of the sill light the room is adequately lighted for the purposes of an ordinary public elementary schoolroom and, adds Mr. Waldram: "A public elementary school constructed according to the rules of the Board of Education"—that is a room wherein there is 1 per cent. of sill light at the worst lighted desk—"is the best side lighted room I have ever come across." For adult clerical work a much lower percentage is required. Mr. Waldram's investigations made some years ago, accepted by textbook writers and confirmed by an average of 0·5 ascertained by the careful measurements of existing conditions at a large number of factories dealt with at pp. 40 and 41 of the First Report of the Departmental Committee appointed by the Home Office "to enquire as to the conditions for the adequate and suitable lighting of factories and workshops," led him to the conclusion that the point whereat ordinary common sense people would begin to grumble at the quantum

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of light would be the point in the room at which the percentage of illumination fell to 0·4 of the sill light, and this point he designates "the grumble point."

It comes therefore to this, that the evidence given on behalf of the defendants proves a room to be adequately lighted for the purposes of adult clerical work so long as the illumination at the worst lighted working point in the room does not fall below 0·4 per cent. of the sill light. I ought to add that the light is measured in all cases at table level—that is three feet above the floor.

On this basis Mr. Waldram measured the light in the areas of the plaintiffs' premises lighted by the four windows with which I am dealing. He selected on the ground floor as the worst lighted point in the triangular area lighted by the two easternmost windows a point in the rear some 15 feet behind the front wall and about half way along the imaginary line forming the third side of the triangle. In existing conditions with the thick hammered glass in the windows and with the iron grilles in front but with no building opposite he measured the daylight factor at that point as 1·4 per cent. of the sill light. He then proceeded to calculate by means of diagrams which are in evidence what the measurement at the same point will be if the defendants' building is erected and ordinary plain glass substituted for the hammered plate glass, and he finds the daylight factor in these circumstances will be 1·5 or 1·6 per cent., and says that this result shows that the lighting conditions on the ground floor will be "distinctly good—very distinctly above the average—quite adequate for the ordinary requirements of ordinary people carrying on a business of this kind in this sort of situation," adding "I think I may go further and say that in my opinion they will remain unusually adequate," and a little later "taking the area affected by the defendants' building the ground floor should remain with normal conditions"—that is, of glazing and cleanliness—"a well lighted and an unusually well lighted ground floor."

On the first floor, after stating his opinion that the office lighted by the three easternmost windows will remain a

thoroughly well lit office after the defendants' building is up he proceeded to give the results of his tests and calculations. The worst lighted point in the room he puts in the angle above the telephone-box—the worst lighted working point at the south end of the long desk against the east wall of the room. At the former the illumination will be 0·8 per cent. —twice the measurement at the grumble point, and at the latter 1·54 per cent. of the sill light—one and a half times the minimum of an elementary schoolroom.

In the face of this evidence strengthened by a careful comparison of the relative proportions of floor and glazed-window areas—unshaken by cross-examination and unchallenged by any satisfactory practical tests on behalf of the plaintiffs, it is impossible for me to hold that the plaintiffs have discharged the burden of establishing that the defendants' operations will constitute an actionable nuisance. The evidence proves I think that the plaintiffs' warehouse is and will remain in enjoyment of an unusually large amount of light having regard to its locality, and in these circumstances I can only dismiss the action with costs.

Solicitors: *Peter Thomas & Clark, for Greaves & Firth, Bradford; Torr & Co., for Norman L. Fleming, Bradford.*

G. M.

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1922

June 29.

In re WILLIAMS' SETTLEMENT.

WILLIAMS WYNN *v.* WILLIAMS.

[1922. W. 1735.]

Settlement—Tenant for Life and Remainderman—Capital or Income—Casual Profit—Compensation for Injury to Park by Military Authorities—Indemnity Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 48), *s.* 2.

When a legal tenant for life of settled land without impeachment of waste recovers compensation under the Indemnity Act, 1920, for damages done to a park forming part of the settled land by military authorities during the war in exercise of the Royal Prerogative, the compensation money is a casual profit and he may retain it for his own use.

In re Lacon's Settlement [1911] 2 Ch. 17 and *In re Barrington* (1886) 33 Ch. D. 523 applied.

In re Bladon [1912] 1 Ch. 45 distinguished.

ADJOURNED SUMMONS.

By deed dated October 20, 1909, Sir William Willoughby Williams conveyed his estates in the counties of Flint and Denbigh commonly known as the Bodelwyddan, Pengwern, and Bodiris Estates to the use of himself and his assigns during his life without impeachment of waste with remainder to the use of his sons successively in tail male with remainder to the use of his brother the defendant Hugh Grenville Williams during his life with remainder to the use of his sons successively in tail male with remainders to the use of another brother (since deceased without having been married) and the sons of that brother with remainder to the use of Sir W. W. Williams' daughters successively in tail general with divers remainders over.

By deed dated March 21, 1919, Sir W. W. Williams assigned to trustees all and singular the rents profits and income arising during his life from the property comprised in the settlement of October 20, 1909, upon trust to pay and keep down certain interest and premium on policies and annuities and subject thereto to allow Sir W. W. Williams to enter into and remain in possession or receipt of the rents and profits of the premises as tenant for life thereof until forfeiture by alienation as

therein mentioned. No forfeiture by alienation had in fact taken place.

On or about December 25, 1915, the park of Bodelwyddan, which comprises about 300 acres, was commandeered by the military authorities. For this no arrangement was made at the time, but for the occupation of the park, which continued until August 31, 1920, the War Office paid 500*l.* per annum to the agent for the settled estates, who accounted for the same as income. No question arose as to this, but the claims out of which questions arose for determination on the summons were: (*a*) a claim for damage done to the park by the digging of trenches, formation of shell-holes and like operations incidental to the military occupation of the park; (*b*) a claim for damage done to the park by the erection thereon and removal therefrom of a large military hospital. As to claim (*a*) an application was made on August 17, 1920, to the War Compensation Court set up by the Indemnity Act, 1920, by the agent to the estate acting as agent for Sir W. W. Williams; and the sum of 2090*l.* 18*s.* 9*d.* was awarded on January 7, 1921. This sum was received by the agent, who placed the amount on deposit. Claim (*b*) had not yet been disposed of, but it was anticipated that a considerable sum might be awarded.

This summons was taken out by the trustees of the two settlements to have it determined whether according to the true construction of the settlements and in the events which had happened the whole or any part of the said sum of 2090*l.* 18*s.* 9*d.* ought to be treated: (i.) as income; (ii.) as capital; or (iii.) as subject to a trust for the application thereof in or towards making good damages to the park caused by the military occupation thereof.

A similar question was asked with regard to any sum that might be recovered in respect of claim (*b*).

H. B. Vaisey for the trustees.

MacSwinney for Sir W. W. Williams. This sum of 2090*l.* 18*s.* 9*d.* is a casual profit and as such belongs to the tenant for life, who is unimpeachable of waste. The matter

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here must be considered in regard only to the first settlement under which he is legal tenant for life unimpeachable of waste. The question arises under the Indemnity Act, 1920, which by s. 2 confers a right to compensation in respect of damage caused by acts done in pursuance of the prerogative. There is nothing in the Act which deals with anything but the interest of the applicant, who was in this case the tenant for life. Nothing is said about the interests of remaindermen and the whole Act is consistent with a tenant for life unimpeachable of waste taking the whole compensation. That a tenant for life is entitled to casual profits is well settled, and it has been decided in *Brigstocke* v. *Brigstocke* (1) that fines and heriots were casual profits; in *In re Hunloke's Settled Estates* (2) that money paid to a legal tenant for life as consideration for accepting the surrender of a lease not granted under the Settled Land Acts was a casual profit; in *In re Lacon's Settlement* (3) that damages recovered by a legal tenant for life without impeachment of waste for dilapidations arising from breaches of repairing covenants in a lease were casual profits. Other cases of casual profits are *In re Dealtry* (4) and *In re Penrhyn's Settlement.* (5) In the latter case it was held that money paid to a legal tenant for life as consideration for accepting the surrender of a lease granted under the Settled Land Acts was a casual profit, but in *In re Rodes* (6) it was held that money similarly paid to an equitable tenant for life was not a casual profit, and in *In re Foster's Settled Estates* (7) that a forfeited deposit upon an abortive sale of a mansion house by a tenant for life was capital moneys. *In re Lacon's Settlement* (3) shows that the fact that injury has been done to the inheritance does not prevent the tenant for life from keeping for his own use the damages or, in this case, the compensation money.

Lindon for an infant remainderman. The waste here in question is not of a kind that a tenant for life unimpeachable

(1) (1878) 8 Ch. D. 357.
(2) [1902] 1 Ch. 941.
(3) [1911] 1 Ch. 351; [1911] 2 Ch. 17.
(4) (1913) 108 L. T. 832.
(5) [1922] 1 Ch. 500.
(6) [1909] 1 Ch. 815.
(7) [1922] 1 Ch. 348.

of waste is entitled to do or authorize others to do. *In re Lacon's Settlement* (1) and most of the other cases cited arose from the relationship between landlord and tenant and relate to matters which the tenant for life could have waived. The explanation of *In re Dealtry* (2) is that the sum received by way of damages for breach of covenant was treated as rent. Here there is no profit, and the most analogous case is *In re Bladon* (3), where compensation for extinguishing a licence under the Licensing Act, 1904, was held to be capital money.

The compensation paid under s. 2 of the Indemnity Act, 1920, is compensation for the injury to the inheritance and ought to be applied in repairing the injury. It is not compensation for the interest of the tenant for life in the property. The loss is ascertained once for all: compare *In re Todd and the North Riding of Yorkshire Agricultural Executive Committee.* (4)

[SARGANT J. Do not damages recovered by a tenant for life for waste done by a trespasser belong to him?]

It was so decided in *In re Barrington.* (5) The principle of *In re Bladon* (3) applies here.

Dighton Pollock for other remaindermen adopted the same argument and referred to *In re Oppenheim.* (6)

SARGANT J. This is an originating summons taken out for the purpose of determining whether, according to the construction of certain indentures of settlement and in the events that have happened, the whole or any part of the sum of 2090*l.* 18*s.* 9*d.*, paid by way of compensation in respect of damage done to a park belonging to the settled land during its occupation by the military authorities ought to be treated as income or capital, or as subject to a trust for the application thereof in or towards making good the damages caused to the park. [His Lordship stated the effect of the two settlements of October 20, 1909, and March 21, 1919.] I do not

(1) [1911] 2 Ch. 17.
(2) 108 L. T. 832.
(3) [1911] 2 Ch. 350; [1912] 1 Ch. 45.
(4) [1921] 1 K. B. 281, 300.
(5) 33 Ch. D. 523.
(6) [1917] 1 Ch. 274.

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think it necessary to refer to the terms of the second settlement in detail, because the rights of the parties—namely, Sir William and the persons entitled in remainder under the first settlement—are entirely regulated by that settlement. It is true that under the second settlement Sir William is only entitled during his life to the balance of the income remaining after certain payments have been made, but he and the other persons entitled under it form collectively the tenant for life under the first settlement. Therefore I have to consider the question in reference to the first settlement only and the legal estate for life without impeachment of waste thereby vested in Sir William. [His Lordship then stated the facts as to the occupation of the park and the questions raised by the summons and continued :]

The park was occupied by the military authorities and military operations carried on there under the Royal Prerogative and the compensation was awarded under the Indemnity Act, 1920. By s. 2, sub-s. 1, of that Act it is provided that "any person not being a subject of a state which has been at war with His Majesty during the war and not having been a subject of such a state whilst that state was so at war with His Majesty— . . . . (*b*) who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property . . . . in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty, ... shall be entitled to payment or compensation in respect of such loss or damage ; and such payment or compensation shall be assessed on the principles and by the tribunal hereinafter mentioned, and the decision of that tribunal shall be final. Provided that— . . . . (ii.) nothing in this section shall confer on any person a right to payment or compensation unless notice of the claim has been given to the tribunal in such form and manner as the tribunal may prescribe within one year from the termination of the war or the date when the transaction giving rise to the claim took place, whichever may be the later." Sect. 2, sub-s. 2 (iii.), provides that compensation shall be assessed as follows : "(*a*) if the

claimant would, apart from this Act, have had a legal right to compensation, the tribunal shall give effect to that right, but in assessing the compensation shall have regard to the amount of the compensation to which, apart from this Act, the claimant would have been legally entitled, and to the existence of a state of war and to all other circumstances relevant to a just assessment of compensation." There is nothing in the statute providing what is to be done with the compensation when it has been received. As I have already said an application was made to the tribunal constituted by Order in Council under this Act and the sum of 2090*l.* 18*s.* 9*d.* has been awarded. A further claim in respect of damage by reason of the erection and removal of a hospital in the park is still outstanding.

The question is whether the compensation can be retained by the tenant for life or whether the amount paid ought to be treated as capital. There are a number of authorities relating to the question how casual profits should be dealt with. It has been decided that casual profits include a payment for accepting the surrender by a tenant of an existing lease and damages for breach of covenants in a lease. These were allowed to be retained by the tenant for life and he was not required to bring them into account so that they could be held for the benefit of the successive persons entitled to the settled property, notwithstanding that damage might have been done to the inheritance.

I will not go through all the authorities, but will only refer to two, which seem to me the most important for the purpose of this case. The first is *In re Lacon's Settlement.* (1) There it was held that " where a tenant for life without impeachment of waste recovers damages from a lessee for dilapidations to the mansion house and buildings arising from breaches of repairing covenants in a lease granted by a previous tenant for life under the statutory power," he is entitled to retain the damages recovered by him as his own property. The second is *In re Barrington* (2), of which the headnote is as follows: " Minerals were devised by will upon trust for B.

(1) [1911] 2 Ch. 17. (2) 33 Ch. D. 523 526.

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for life without impeachment of waste, with remainder on trust for the defendant for life without impeachment of waste, with remainders over. During the life, and also after the death of B., part of these minerals were won by instroke by the owners of adjoining mines, who had trespassed innocently and paid compensation moneys for so doing:—*Held*, that the moneys paid in respect of the minerals so won during the respective lives of B. and the defendant, belonged to the estate of B. and to the defendant respectively." There was in that case a further question as to compensation paid by a railway company, which is not material.

Kay J. in deciding that case dealt with the general principles applicable to cases of casual profits and said (1): "The question is to whom the moneys in respect of such trespass belong. The point seems to be completely determined by authority. No doubt, if a tenant for life who is impeachable of waste improperly commits waste by cutting trees or digging minerals, such trees or minerals when severed become at once the property of the owner of the first estate of inheritance in esse." He then quoted authorities in support of this and continued: "And in such case an intermediate tenant for life without impeachment of waste cannot recover the proceeds in trover. . . . . The reason for this seems to be that he had no right to the timber cut before his estate came into possession. The same law applies if the timber be severed by the act of God, as by tempest, or by a trespasser: see *Bewick* v. *Whitfield*. (2) On the other hand, if the severance be in the lifetime of a tenant for life who is unimpeachable of waste the severed portion of the inheritance belongs to such tenant for life." He then referred to a statement of the Master of the Rolls in an anonymous case in Mosely (3) that "if a stranger cut down timber, or commit any other waste, it belongs to the tenant for life, who is dispunishable of waste, and not to the remainderman in tail, or in fee." And he added: "This was followed by Lord Mansfield C.J. in *Pyne* v. *Dor* (4), who said, 'that a tenant for life without

(1) 33 Ch. D. 523, 526.
(2) (1734) 3 P. Wms. 267.
(3) (1729) Mosely, 238.
(4) (1785) 1 T. R. 55, 56.

impeachment of waste, has a right to the trees the moment they are cut down.' And in *Bagot* v. *Bagot* (1) and on appeal (2) the law as to timber and minerals is treated as being precisely identical."

I think that case is of great importance and for this reason. Assume that the military authorities had been in the position of private individuals and had not had the protection of the Royal Prerogative. If then they had entered and injured the park and thereupon the tenant for life not being impeachable of waste had sued and recovered damages, *In re Barrington* (3) shows that any damages so recovered would have been retainable by the tenant for life and would not have belonged to the successive owners of the settled land notwithstanding the damage to the inheritance. So by analogy it seems to me that the compensation awarded in respect of the damages done by the Crown might well have been intended to follow the same rule. If that be so, that may explain the absence from the Indemnity Act, 1920, of any provision that amounts paid by way of compensation for injury to settled property are to be held on account of the persons successively entitled.

Further, in my opinion the money received in respect of the damage to the park is a casual profit. It is hard to think of anything of a more casual nature. It is something received by reason of an event which I hope is not likely to recur, at any rate for many years to come. On general principle, therefore, and upon consideration of the origin of this particular sum of money and of the absence of any provision in the Indemnity Act providing for any other destination for this money, I hold that the tenant for life being unimpeachable of waste is entitled to retain the amount recovered by him as compensation for the injury to the park.

I may add that the case of *In re Bladon* (4), on which reliance has been placed, is really of no assistance. That was a case relating to compensation paid for extinguishing a licence

(1) (1863) 32 Beav. 509.
(2) (1864) 33 L. J. (Ch.) 122n.
(3) 33 Ch. D. 523.
(4) [1912] 1 Ch. 45.

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under the Licensing Act, 1904, where the licensed premises formed part of a settled estate; and the Court of Appeal said that the question who was entitled to the proportion of the compensation allocated to the freeholder was entirely governed by a specific provision of the statute that the compensation was to be "paid as compensation to the persons interested in the licensed premises." They therefore held that the compensation must be treated as capital money of the estate. There is nothing of that sort in the Indemnity Act, 1920, and I must hold the tenant for life to be entitled to retain this sum of 2090*l.* 18*s.* 9*d.*

Unless there should be quite exceptional circumstances, the decision will be the same in the case of any compensation that may be recovered in a similar way in respect of the injury to the park caused by erecting a hospital and leaving the foundations there when it was removed. But I will make no declaration as to this, as it is a future question. I will make a declaration with regard to the tenant for life's right to retain the sum of 2090*l.* 18*s.* 9*d.* and the same reasoning will apply to the other compensation unless there are special circumstances to distinguish it.

Solicitors: *Soames, Edwards & Jones; W. F. Foster.*

H. C. G.

In re SUMMERS BROWN'S PATENT.

SARGANT J.

1922 *July* 13.

[1921. B. 6597.]

Patent—Extension of Term—Loss by reason of the War—Assignment of Patent after Termination of War—Application by original Patentee and his Assignees—Summons—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 18—*Patents and Designs Act*, 1919 (9 & 10 *Geo.* 5, *c.* 80), *s.* 7, *sub-s.* 3.

The Patents and Designs Act, 1919, s. 7, sub-s. 3, provides that at the end of s. 18 of the Patents and Designs Act, 1907, which enables petitions for the extension of patents to be made, the following sub-section shall be added: "(6) Where by reason of hostilities between His Majesty and any foreign state, the patentee as such has suffered loss or damage . . . . an application under this section may be made by originating summons instead of by petition, and the Court on considering its decision may have regard solely to the loss or damage so suffered by the patentee. . . . .":—

Held, (1.) that where a patentee has assigned his patent since the war he and his assignee are entitled to apply together for an extension under the sub-section; but (2.) that the Court will in determining the extension to be granted take into account loss or damage suffered by the then patentee as such only and not losses suffered by the assignee in the character of sole licensee during the war.

ADJOURNED SUMMONS.

Letters Patent No. 12,801 of 1906 was granted to Summers Brown and under an agreement dated February 25, 1909, Roneo, Ld., became sole licensees for the manufacture, use, and exercise of the invention. They continued to be sole licensees until by deed dated January 27, 1920, the patentee assigned the letters patent to the company absolutely in consideration of the sum of 3200*l.* The deed provided that the patentee would grant to the company the benefit of any extension of the term of the patent and that in consideration the company would pay to him the sum of 500*l.* for each year of the extension.

The original patentee and the company as the registered legal owners of the patent took out this summons under the Patents and Designs Acts, 1907 and 1919, seeking an extension of the term of the patent in respect of losses by reason of the war. Evidence was adduced by affidavit showing that the original patentee had suffered loss in respect of royalties

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and that the company had suffered loss by reason of their inability to manufacture the invention.

At the hearing the preliminary objection was taken on behalf of the Comptroller that the application could not be made by originating summons under s. 18 of the Patents and Designs Act, 1907, as amended by s. 7, sub-s. 3, of the Patents and Designs Act, 1919 (1), because the company who were the existing patentees had not suffered loss as such by reason of the war, and the original patentee, who had suffered loss, had ceased to be the patentee.

J. Whitehead for the applicants. It does not affect the rights of the applicants to obtain an extension by summons under the sub-section added by the Patents and Designs Act, 1919, that the original patentee has since the conclusion of the war assigned the patent to Roneo, Ld. On an ordinary application under s. 18, sub-s. 5, of the Act of 1907, the Court would grant an extension to an original patentee and his assignee on being satisfied that the original patentee receives his share of the benefit of the extension. The words "patentee as such" in the new sub-section must be given the same meaning as in sub-s. 5 of s. 18—namely, the patentee for the time being and his predecessors in title. By coming to the Court together therefore the original patentee and his assignees are entitled to an extension under sub-s. 6. The question is really one of procedure, for the applicants could certainly have applied by way of petition.

Dighton Pollock for the Comptroller. This is not a mere

(1) Patents and Designs Act, 1907, s. 18: "(1) A patentee may . . . . present a petition to the Court praying that his patent may be extended for a further term, . . ."

"(5) If it appears to the Court that the patentee has been inadequately remunerated by his patent, the Court may by order extend the term of the patent for a further term. . . . ."

Patents and Designs Act, 1919, s. 7, sub-s. 3: "At the end of the same section [s. 18 of the Act of 1907] the following sub-section shall be added:—

'(6) Where, by reason of hostilities between His Majesty and any foreign state, the patentee as such has suffered loss or damage . . . . an application under this section may be made by originating summons instead of by petition, and the Court in considering its decision may have regard solely to the loss or damage so suffered by the patentee: . . . .'"

question of procedure. Here the original patentee may have suffered loss by reason of the war, but he is not "the patentee" for the purpose of sub-s. 6. The assignees are now the patentees for the purpose of the sub-section and they, as such, have suffered no loss. Sub-s. 6 cannot be construed by reference to sub-s. 5. It is a new enactment under the Patents and Designs Act, 1919. The applicants are free to apply for an extension by petition under sub-s. 5, but then the whole merits will have to be gone into and not simply the question whether loss has been suffered by reason of the war.

J. Whitehead in reply. The Court has already decided in *In re Brown's Patent* (1) that the earlier sub-sections of s. 18 of the Act of 1907 apply to a proceeding by way of originating summons under the new sub-section substantially as they apply to an application by way of petition under the original s. 18. The Court has also indicated that an application under the new sub-section ought not to be made till near the end of the existing patent. It would be a great hardship if a patentee was to be debarred perhaps for years from assigning his patent without the rights under sub-s. 6 being lost.

SARGANT J. This is an application by originating summons under sub-s. 6 of s. 18 of the Patents and Designs Act, by Mr. Summers Brown, the grantee of certain Letters Patent, and Roneo, Ld., who are the registered legal owners of the Letters Patent by assignment from Mr. Summers Brown, for an extension of the patent by reason of loss or damage suffered through the recent war.

There is a preliminary objection arising from the following facts. Some little time after the granting of the patent, Mr. Summers Brown granted an exclusive licence to Roneo, Ld., and Roneo, Ld., have since been the only persons manufacturing in accordance with the Letters Patent. There is no doubt that the manufacture of the patented article was seriously prejudiced by the war, and losses were suffered by

(1) (1920) 37 R. P. C. 52, 55.

SARGANT J. 1922 SUMMERS BROWN'S PATENT, *In re.*

Roneo, Ld., as licensees, and it is also the fact that losses were suffered during the period of the war by the patentee, Mr. Summers Brown, as patentee, by reason of the diminution of the royalties payable. As a matter of fact those two classes of damage are not exactly proportionate. The damage suffered by Roneo, Ld., as manufacturers, has been proportionately very much greater than the damage suffered by Mr. Summers Brown as patentee, but that is immaterial for the purposes of the preliminary objection. It appears, however, that in the year 1920, some time after the cessation of the loss in respect of which the application is now made, Mr. Summers Brown assigned the Letters Patent out and out to Roneo, Ld., and he made arrangements under which, if there was an extension granted to Roneo, Ld., he, Mr. Summers Brown, was to share in the advantages that they would presumably obtain to the extent of 500*l.* a year. That, incidentally, seems to me to be a perfectly fair bargain between him and Roneo, Ld.

What is said on the part of the Crown is that "the patentee" means the person who is the owner of the patent at the date of the application. I think, speaking generally, that is quite true. Under sub-s. 1 of s. 18 a patentee has to apply to the Court. Then it is said that the only person who has suffered damage by reason of the war is not now the patentee because, although Roneo, Ld., the present patentees, suffered damage, they did so in their capacity of manufacturers and not of patentees. They were not patentees at the time they suffered damage, and therefore it is said that they are not entitled to rely on the loss or damage they suffered as a ground for an extension. On the other hand, it is said as regards the loss or damage suffered by Mr. Summers Brown, that, while it is true that at the time he suffered it he was the patentee, he is not the patentee now, and that it is only the patentee at the present moment that the Court is entitled to regard. The Crown rely on the strict words of sub-s. 6: "Where, by reason of hostilities between His Majesty and any foreign state, the patentee as such has suffered loss or damage."

They say: Roneo, Ld., are the patentees; they never suffered loss or damage as patentees; they merely suffered it as manufacturers; Mr. Summers Brown is not now the patentee and therefore, although he has suffered loss or damage as patentee, still he is not given any opportunity of coming for an extension under sub-s. 6.

It seems to me that this argument really involves dealing with sub-s. 6 as if it were entirely independent legislation, and not inserted by way of proviso, addition, or qualification into a previously existing section which determines the ordinary rights of owners of patents to obtain extensions of the terms of their patents. Under sub-s. 5 the ordinary right to apply for an extension is defined, and it is defined in this way: "If it appears to the Court that the patentee has been inadequately remunerated by his patent, the Court may by order extend the term of the patent for a further term not exceeding seven, or, in exceptional cases, fourteen years"—those additional terms have now been reduced to five years and ten years respectively—"or may order the grant of a new patent for such term as may be specified in the order and containing any restriction, conditions and provisions the Court may think fit." That is a sub-section which practically repeats the legislation under which the Privy Council used to act and under which my predecessors, the late Lord Parker and Warrington L.J., have acted. Over and over again applications have been made under that sub-section, or under the corresponding legislation, by assignees of patents with the concurrence of the original patentee, and the phrase "the patentee" in that sub-section has invariably been construed as meaning the successive patentees throughout the term of the patent. Thus the remuneration which has to be taken into account is not the remuneration merely of the patentee at the date of the application by petition, but the remuneration earned by that person and his predecessors in title. If this were an application under sub-s. 5 by petition there could be no doubt that an objection corresponding to that which has been put forward by the Crown could not be sustained.

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That being so, ought I to put a different construction on the phrase "the patentee" in sub-s. 6; ought I to say that in that case I must look simply and solely at the person who happens to be the patentee at the time that the application is made, and not take into account the loss or damage suffered by any previous patentee? In my judgment to do that would be to go back on the principle which I laid down in *In re Brown's Patent* (1), that prima facie the position of persons coming under sub-s. 6, is the same as that of persons coming under sub-s. 5, and the previous sub-sections of s. 18, except for the special matter introduced by sub-s. 6. I held also (and that is a very material matter in this present case) that under sub-s. 6 the patentee was not entitled to apply until close on the termination of the patent.

In this particular case before the assignment, the patentee, Mr. Summers Brown, had undoubtedly suffered loss or damage and was in a position, when the requisite time had expired and the patent was near its termination, to come before the Court and ask under sub-s. 6 for an extension of his patent rights. Early in 1920 he assigned. Why should the right that he then had be taken away from him and his assignee together because of that assignment? Such a construction would be a very harsh one, as it seems to me, and might be particularly harsh in view of what Mr. Whitehead has been urging upon me. There might, as he pointed out, be patents which would not expire till 1928 or thereabouts in regard to which the actual patentee at the time of the war might have suffered great loss or damage so as to be entitled prospectively to hope for an extension of the patent. It would be very harsh indeed, if such a person was utterly unable to deal with his patent by way of assignment without having taken away from him and his assignee together that right to an extension which he would presumably have had but for the assignment.

In my judgment I ought to have regard to the loss or damage suffered in his capacity of patentee by the person who was the patentee at the time of the loss or damage,

(1) 37 R. P. C. 52.

notwithstanding that he subsequently assigned his patent to some other person, so long as he and the subsequent assignee come together to the Court for an extension. That disposes of the preliminary objection.

[His Lordship then proceeded to deal with the merits, and after pointing out that while the loss of the manufacturers by reason of the war would have justified an extension of about three years, the loss to the patentee had been no more than about a year's loss of royalties, continued:] It is unfortunately the loss to the patentee as such and not the loss to the licensees as manufacturers that I must deal with. That being so, I grant an extension of one year.

Solicitors: *F. P. Woodcock; Solicitor to Board of Trade.*

H. C. G.

Applied. In re LYONS [1951] Ch. 1093

In re PETTIT.

LE FEVRE *v.* PETTIT.

[1922. P. 662.]

Considered. In r BATLEY, DECD. (No 2) [1952] 1 Ch. 78

Will—Annuities—"Free of income tax"—Repayment to Annuitants of portion of income tax under Income Tax Acts—Sums repaid how applicable as between Annuitants and residuary Estate.

Testator gives an annuity free of income tax, and the annuitant, under the provisions of the Income Tax Acts, obtains relief by way of repayment of income tax in excess of the amount properly payable by him:—

Held, that the residuary estate of the testator is entitled to such proportion of the sum so repaid as the annuity bears to the total income of the annuitant.

ADJOURNED SUMMONS.

The testator, by his will, dated December 6, 1913, devised and bequeathed his residuary real and personal estate to his trustees upon the usual trusts for sale and conversion, and directed them, after paying and providing for his funeral and testamentary expenses, death duties, debts and legacies,

ROMER J. 1922 — PETTIT, *In re.* LE FEVRE *v.* PETTIT. —

to invest the residue of the moneys arising from such sale and conversion in the manner therein mentioned, and to stand possessed of the trust premises and the annual income thereof upon trust to pay an annuity of 1000*l.* free of duty and income tax to his wife, the defendant Jane Pettit for life, and an annuity of 400*l.* free of duty and income tax to his daughter, the defendant Eliza Elizabeth Tusting for her life without power of anticipation, such annuities to commence from his death and to be paid by equal quarterly payments, and he directed that his trustees should set apart and invest such a sum of money as would, when invested, produce an annual income equal to the amount of the annuities, and, until such sum should be appropriated, he charged his residuary personal estate with the annuities, and, subject thereto, he directed his trustees to stand possessed of the trust premises upon certain trusts for the benefit of the issue of the defendant E. E. Tusting. The testator died on July 11, 1917, and, as from his death, the annuities were duly paid out of the residuary personal estate without any deduction. These sums were wholly paid out of profits which had been brought into charge to income tax. Claims were made by or on behalf of the annuitants under the provisions of the Income Tax Acts for relief by way of repayment of income tax paid by them or on their behalf for the financial years 1917–18, 1918–19, 1919–20, and 1920–21 in excess of the amount properly payable by them for those several years. As a result of these claims the Special Commissioners of Income Tax repaid the several sums of 27*l.* 13*s.* 2*d.*, 81*l.* 9*s.* 10*d.*, 67*l.* 14*s.* 10*d.*, and 66*l.* 9*s.* 1*d.* in respect of the claim of the defendant Jane Pettit, and the several sums of 17*l.* 13*s.* 3*d.*, 22*l.* 5*s.* 8*d.*, 92*l.* 8*s.* 2*d.*, and 101*l.* 5*s.* in respect of the claim of the defendant E. E. Tusting, and such sums had by arrangement, and without prejudice to any question, been paid to the trustees of the will. The defendant E. E. Tusting had had issue three children.

In these circumstances the trustees now applied to the Court for the determination of the question whether the sums referred to belonged wholly to the two annuitants

respectively, or whether such sums or any part thereof formed part of the residuary estate of the testator.

Bryan Farrer for the plaintiffs. The question raised by this summons was raised before Sargant J. in *In re Hutty* (1), but in that case it was not contended that the annuitants got more than their annuities, and Sargant J. followed *Burroughes* v. *Abbott.* (2)

Stamp for the annuitants. The trustees, in paying the annuities, are simply carrying out their trust, and they have no right to demand to have handed over to them any incidental benefits that come to the annuitants through the trust. The annuitants are entitled to keep any windfalls that come to them. The trustees could not themselves claim against the revenue authorities, and there is nothing in the will or in law to compel the annuitants to make the claim for them. If the trustees are entitled to retain these sums they would be in the nature of windfalls, and the trustees would have to pay taxes on them.

F. K. Archer for the residuary legatees. The question is, what is the income to which the annuitants are entitled? If it is shown that they have received too much the Court will adjust the matter. The point was discussed in *Burroughes* v. *Abbott.* (2) The direction here is to pay the testator's widow 1000*l.* a year and no more. The income tax paid on the 1000*l.* is the full amount, subject to any rebates or other incidents. Sect. 18 of the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), as amended by the Finance Act, 1920 (10 & 11 Geo. 5, c. 18), provides that any allowance or deduction shall be given by repayment of the excess which has been paid. The excess has been paid by the trustees, and they are entitled to the repayment. The reasoning of Warrington L.J. in *In re Cain's Settlement* (3) applies to this case. The trustees, as agents for the annuitants, have paid the tax. It appears that they have paid too much, and, therefore, they can tell the annuitants to get back the excess for them. The arguments

(1) Unreported. (2) [1922] 1 Ch. 86.
(3) [1919] 2 Ch. 364, 370.

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advanced on behalf of the annuitants are incompatible with the decision of Sargant J. in *In re Doxat* (1), where it was held, following *In re Bowring* (2), that where an annuity was given free of income tax and all other deductions, and the annuitant was liable for super tax, the income of the residuary estate had to bear such proportion of the total super tax payable by the annuitant as the annuity, together with the income tax thereon, bore to the total income of the annuitant assessed for super tax: see Konstam on The Law of Income Tax, 285. That really covers the point in this case; the trustees are entitled to retain the rebates in the same proportions. If they are not, then the annuitants get more than the amount of their annuities, and the residuary legatees, who pay the income, get no benefit from the rebates. The machinery of taxation cannot affect the rights of beneficiaries inter se.

Stamp in reply. Cases that have been decided on super tax are alien to the present case; income tax attaches to each item separately, super tax is a direct charge on the person liable to pay it. Here we are dealing with income tax. The income tax the trustees have to pay is on the annuities; the rebates are on the total income tax paid by the annuitants on their whole income, and they are something which each individual who pays excess income tax is entitled to get back for himself or herself.

Cur. adv. vult.

June 29. ROMER J. delivered the following written judgment:

The precise question raised by this summons came recently before Sargant J. in *In re Hutty* (3), but I am informed that in that case the question whether the annuitants were, in such circumstances, entitled to retain for their own benefit the whole sum repaid by the Special Commissioners was not argued, and that the only question discussed was what proportion of the total sum repaid should be treated as referable

(1) (1920) 125 L. T. 60. (2) [1918] W. N. 265.
(3) Unreported.

to the annuities (the annuities forming part only of the annuitants' taxable income), the annuitants not disputing that the amount properly referable to their respective annuities could not be retained by them.

In those circumstances it was decided by Sargant J. that the trustees were entitled in each case to such proportion of the total sum repaid as the annuity bore to the total income of the annuitant. In the present case the annuitants admit that, if they are not entitled to retain for their own benefit the whole of the sums so repaid by the Special Commissioners, this is the proper proportion of such sums to be paid to the trustees; but they have argued before me that they are so entitled.

For the purpose of deciding this point, it will be convenient to consider the position and rights of the defendant Jane Pettit alone and as though hers were the only annuity given by the will. The considerations that apply to her will apply equally to the other annuitant.

As has already been stated the 1000*l.* was paid out of income that had already been brought into charge to tax, the tax having been deducted at source before the income was received by the trustees. But as has often been pointed out, payment at the source is nothing more than the machinery by which the revenue collects the tax from the person ultimately liable to pay, and the rights of the parties are, as between themselves, precisely the same as though the trustees received the gross income and had themselves to pay the tax to the revenue. In that case, and treating the annuity of the defendant Jane Pettit as the only one payable, the trustees would in each year have had to set aside in respect of her annuity such a sum as, after payment of the tax properly payable thereon, would leave a clear sum of 1000*l.* Out of this sum the trustees would pay the tax to the revenue and the 1000*l.* to the annuitant. The remainder of the gross income after payment of tax thereon would belong to the residuary legatees. It would, however, be impossible for the trustees to ascertain what rate of tax was ultimately payable in respect of the annuitant's income, and in any case they

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would, under the provisions of the Income Tax Acts, be bound, in the first instance, to treat that income as liable to the ordinary rate. In the year 1918–19, for instance, when the ordinary rate of income tax was 6*s.* in the £ the trustees would have had in the first instance to set aside 1428*l.* 11*s.* 5*d.* and to pay 428*l.* 11*s.* 5*d.* to the revenue and the balance to the annuitant. But this sum might in the end prove to be too little or too much. If the annuitant were liable to pay super tax it would be too little and the proper proportion of her super tax referable to her annuity would, when ascertained, have to be paid to her by the trustees and would so go to reduce the income payable to the residuary legatees. It might on the other hand turn out that the circumstances of the annuitant were such that she was not liable in respect of her income to the full rate of income tax, that, in my opinion, being the true effect of the provisions for relief and abatement contained in the relevant taxing Acts. In that case the sum so set aside and the 428*l.* 11*s.* 5*d.* paid in the first instance to the revenue would be too much, and if, in consequence of this, the annuitant is repaid the excess by the Special Commissioners, I cannot understand on what ground it can be suggested that such excess should be retained by the annuitant who has not paid it, and not be handed back to the residuary legatees who have. If the annuitant were to retain the excess she would in the end have received out of the estate more than 20*s.* in the £ on the 1000*l.* given to her by the will. The total income of the annuitant for the year 1917–18 was 1106*l.* 6*s.*, in respect of which income tax at 5*s.* in the £, amounting to 276*l.* 11*s.* 6*d.*, had been deducted at source. Having regard, however, to the provisions of s. 26 of the Finance Act, 1916, which in effect provided that a lower and graduated rate of tax should be payable in case of incomes not exceeding 2000*l.*, she was only liable to tax amounting to 248*l.* 18*s.* 4*d.*, and the difference between this sum and the tax actually deducted was 27*l.* 13*s.* 2*d.*, being the first of the eight sums with which I have to deal. Of her net income for this year, amounting to 829*l.* 14*s.* 6*d.*, 750*l.* represented the annuity, and I accordingly hold that a proportion of the 27*l.* 13*s.* 2*d.*,

equivalent to the proportion that 750*l.* bears to 829*l.* 14*s.* 6*d.*, should be retained by the trustees as part of the testator's residuary estate. The balance, of course, will be paid to the annuitant. It is unnecessary to refer in detail to the other sums with which I have to deal, as the same principle will apply to them.

Solicitors: *Crossman, Block, Matthews & Crossman, for Sharman & Trethewy, Bedford.*

P. J. B.

In re BIEDERMANN. BEST *v.* WERTHEIM.

[1921. B. 4278.]

Will—Life Annuity—Forfeiture—Event—"Voluntarily or involuntarily alienate or encumber"—Charge created by Paramount Power—Austrian National—Treaty of Peace (Austria) Order, 1920.

By his will dated March 31, 1911, a testator bequeathed an annuity of 250*l.* to an Austrian national "until he shall die or voluntarily or involuntarily alienate or encumber . . . . the same."

The testator died on August 22, 1914, during the war. The annuity was therefore accumulated in the hands of his legal personal representative, who made the proper returns to the custodian under the Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), s. 3, but no vesting order was made under s. 4.

By the Treaty of Peace (Austria) Order, 1920, the annuity and its accumulations were, as from July 16, 1920, charged in favour of the Administrator of Austrian Property, to secure (inter alia) payment of debts owing by Austrian to British nationals:—

Held, that the charge created by the Treaty of Peace Order was not an involuntary alienation or encumbrance within the meaning of the will, so that the current annuity since July 16, 1920, was not forfeited, but was payable to the Administrator of Austrian Property.

Decision of Astbury J. [1922] 1 Ch. 31 affirmed.

APPEAL from the decision of Astbury J. (1)

By his will dated March 31, 1911, a testator made (inter alia) the following bequest: "I give to my nephew Ernst Wertheim of Vienna an annuity of 250*l.* free of legacy duty payable quarterly out of the income of my estate until he shall die or voluntarily or involuntarily alienate or encumber

(1) [1922] 1 Ch. 31.

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or attempt or affect to alienate or encumber the same or some part thereof but no longer."

The testator made two codicils on October 14, 1913, and December 5, 1913, which are not material, and died on August 22, 1914.

In November, 1914, administration with the will annexed was granted to the testator's widow, the executors having renounced probate. The widow died on October 4, 1917, and on December 5, 1917, administration de bonis non was granted to the plaintiff.

The annuitant being an Austrian subject resident in Vienna the annuity was not paid, but the amount was accumulated in the hands of the legal personal representative, who made the proper returns to the custodian under the Trading with the Enemy Amendment Act, 1914, s. 3, but no vesting order was made under s. 4.

On August 13, 1920, the Treaty of Peace (Austria) Order, 1920 (St. R. & O. 1920, vol. ii., p. 426), was passed under the powers of the Treaties of Peace (Austria and Bulgaria) Act, 1920 (10 & 11 Geo. 5, c. 6), and the annuity and the accumulations were thereby charged in favour of the Administrator of Austrian Property, as from July 16, 1920, the date of the Austrian Peace Treaty. The charge given by clause 1 (ix.) (loc. cit., pp. 428, 434) was to secure (inter alia) payment of debts owing by Austrian to British nationals, with a corresponding right of Austrian nationals to compensation against Austria under art. 249 (*j*) of the Treaty (loc. cit. p. 442).

On August 5, 1921, the plaintiff issued this originating summons to determine (*a*) whether the annuity had been forfeited or was still payable; (*b*) to whom the accumulations up to July 16 belonged; (*c*) to whom the annuity since that date was payable.

Astbury J. held (1.), following *In re Levinstein* (1), that the accumulations up to July 16, 1920, passed to the Administrator of Austrian Property, and (2.) that the charge created by the Treaty of Peace Order was not an involuntary

(1) [1921] 2 Ch. 251.

alienation or encumbrance within the meaning of the will, so that the current annuity since July 16, 1920, was not forfeited, but was payable to the Administrator of Austrian Property.

The residuary legatees appealed. The appeal was heard on June 27, 1922.

Luxmoore K.C. and *Bischoff* for the appellants. The appellants do not desire to question the decision in *In re Levinstein* (1) and must therefore admit that the accumulations of the annuity passed to the Administrator of Austrian Property. The only question on this appeal is as to the meaning of the words "involuntarily alienate or encumber" in the will. Did this annuitant "involuntarily alienate or encumber" the annuity? Taken literally these words are contradictory and meaningless. Some meaning must however be given to them and it is submitted that the meaning of the clause is, if the annuitant "voluntarily alienates or encumbers" or "involuntarily suffers alienation or encumbrance by operation of law," that is, if something happens without the exercise of the will of the annuitant which may result in an alienation or an encumbrance. The words cannot be limited to the event of bankruptcy. It is submitted therefore that the effect of the charge in the Peace Order has been to bring about an involuntary alienation of or encumbrance on the annuity and that the annuity is therefore forfeited.

[They also referred to *Avison* v. *Holmes*. (2)]

Clayton K.C. and *Myles* for the annuitant, *Sir Ernest Pollock A.-G.* and *Sheldon* for the Administrator of Austrian Property, and *Watt Dollar* for the plaintiff were not called upon to argue.

LORD STERNDALE M.R. This is an appeal from the decision of Astbury J. upon the question whether an annuity given by the will of a gentleman named Biedermann to his nephew, Mr. Wertheim, has been forfeited. Mr. Wertheim is an Austrian subject resident in Austria, and under the will

(1) [1921] 2 Ch. 251. (2) (1861) 1 J. & H. 530.

C. A. 1922 BIEDERMANN, *In re.* BEST *v.* WERTHEIM. Lord Sterndale M.R.

of his uncle an annuity was given to him in these terms: "I give to my nephew, Ernst Wertheim, of Vienna, an annuity of £250 free of legacy duty, payable quarterly out of the income of my estate until he shall die or voluntarily or involuntarily alienate or encumber or attempt or affect to alienate or encumber the same or some part thereof but no longer." By the Treaty of Peace (Austria) Order, 1920, a charge was imposed upon the property of nationals of the former Austrian Empire, and if this annuity be not forfeited I can have no doubt that a valid charge was imposed upon it. The question is whether the charge attempted to be imposed upon it by the Administrator of Austrian Property is such an alienation as under the clause in the will, which I have read, worked a forfeiture, in which case the appellants, the residuary legatees, say that they take the annuity. Of course, when persons use such foolish words as those in the present case in their wills it is very difficult for the Court to be quite sure whether it is attaching a sensible meaning to insensible words, but the learned judge has held that whatever the words "voluntarily or involuntarily alienate" may mean in this clause, the forfeiture is made to depend upon something which has to be done by the annuitant; to use his own words (1): "I think, on the whole, that the true construction of this clause involves, and was intended by the testator to involve, some act of the annuitant resulting in alienation or encumbrance voluntarily intended, or involuntarily resulting therefrom." I think on the whole that that is the right construction, and that therefore the learned judge's decision was right, and that the charge imposed by the Treaty of Peace Order did not work a forfeiture.

WARRINGTON L.J. I agree, and have nothing to add.

YOUNGER L.J. I agree.

Solicitors: *Dawes & Sons; J. J. Edwards & Co.; Solicitor to Clearing Office.*

(1) [1922] 1 Ch. 35.

W. I. C.

In re FENWICK.

LLOYDS BANK, LIMITED *v.* FENWICK.

SARGANT J.

1922

June 21.

[1922. F. 876.]

Will—Construction—Special Fund for payment of all Duties to which Estate "shall be liable"—Absolute Gift of Residue of Fund—Tenants for Life—Estate Duty payable on Deaths of—Fund not liable—Finance Act, 1914 (4 *& 5 Geo.* 5, *c.* 10), *s.* 14.

A testator who died in 1912 gave, by clause 7 of his will, certain shares to his executor "upon trust to sell so many of such shares as shall be sufficient to pay all my debts and funeral and testamentary expenses . . . and all duties of every description (including settlement estate duty where payable), to which my estates, both real and personal, or any part thereof, shall be liable, and, subject to such payments, in trust for my son G. F. absolutely": and he devised and bequeathed his residuary real and personal estate to his trustee free of all duties upon trust to pay the income thereof to his wife during her life, and after her death in trust for his two daughters for their lives, with remainders over.

The question having been raised whether the duties payable on the deaths of the testator's daughters under s. 14 of the Finance Act, 1914, were charged under or by virtue of clause 7 of the will on the shares bequeathed by that clause:—

Held, that what the testator contemplated by clause 7 was an immediate process under which the shares were to be sold and applied in paying duties which were presently payable, and under which, after those duties had been paid, the residue of the shares or the proceeds were to be handed over to G. F.

By his will dated July 16, 1910, George Antony Fenwick (by clause 1) appointed Lloyds Bank, Ld., to be his executor and trustee. By clause 2 he gave his wife a legacy of 5000*l.* free of all duties, and by clauses 3, 4, 5 and 6 he gave various specific bequests free of all duties. By clause 7 he bequeathed "all my shares in Lloyds Bank, Limited (except the 2,000 of such shares hereinafter mentioned bequeathed with my residuary estate) to the bank upon trust to sell so many of such shares as shall be sufficient to pay all my debts and funeral and testamentary expenses, and the legacies of 500*l.* each to my two daughters, and all duties of every description (including settlement estate duty where payable) to which

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my estate, both real and personal, or any part thereof, shall be liable, and, subject to such payments, in trust for my son Gerard Fenwick absolutely." By clause 8 he appointed unappointed funds under a settlement to his son, subject to all duties. By clause 9 he devised his share in a certain freehold estate free of all duties upon trust to pay the income thereof to his wife during her life, with remainder to the use of his son in fee simple. By clause 10 he devised and bequeathed 2000 shares in Lloyds Bank, and all other his real and personal estate not otherwise disposed of, to the bank free of all duties, upon trust to pay the income thereof to his wife during her life, and after her death as to one moiety upon trust to pay the income thereof to his daughter, Sophia Frances Cartwright, during her life, and after her death in trust for her children, and if she should die without issue, then as to one-half of such moiety in trust for his son, and as to the other half upon the same trusts for the benefit of his daughter, Dorothy Rich (then Dorothy Fenwick), and her children as thereinafter declared in respect of the other moiety of his residuary estate, and as to the other moiety upon trust to pay the income to his daughter, Dorothy, and after her death in trust for her children, and if she should die without issue then in trust for such person or persons as she should by will appoint, and in default of such appointment in trust for his son absolutely. The testator died on October 16, 1912.

The plaintiff bank in July, 1913, having paid the testator's debts, transferred to Gerard Fenwick 600 shares in Lloyds Bank on account of the bequest contained in clause 7 of the will, retaining sufficient shares for payment of future duties as the law then stood, but the shares retained would not be sufficient to meet estate duty, which, under s. 14 of the Finance Act, 1914, would become payable on the deaths of the testator's daughters. By a deed dated December 31, 1920, the testator's widow voluntarily released to Gerard Fenwick her life interest in the estate demised by clause 9 of the will. Part of this estate was sold, and the plaintiff bank held about 3800*l.* out of the proceeds in trust for Gerard Fenwick. The testator's daughter, Dorothy Rich, had had

two children; his daughter, Sophia Cartwright, had had no issue.

A question having arisen whether the estate duty, payable on the deaths of the testator's daughters, should be provided for out of the fund created by clause 7 of the will, the plaintiff bank took out this summons asking for the determination of the question whether such duty, and any other duties, to become payable under the will, were charged under or by virtue of clause 7, and whether it might retain as security therefor the 3800*l.* held by it in trust for Gerard Fenwick.

E. Beaumont for the plaintiff bank.

H. A. Hind for the testator's daughters. It is evident that the testator contemplated that all duties, whether payable immediately on his death or at some future date, should be thrown on the special fund: *In re Stoddart* (1); *In re Parker.* (2) The words here are even wider than in *In re Stoddart.* (1) The words "shall be liable" are a very strong indication that the testator intended that future duties, if any, should be paid out of the fund. The creation of the special fund was in itself a clear indication that all interests were to be free of duties, present or future.

J. W. F. Beaumont for the infant defendants. This is an entirely different case to that of *In re Wedgwood* (3), where the words were "free of all death duties." The question was whether the words "shall be liable" applied to the duties payable on the testator's death, or to those payable in accordance with the dispositions in his will.

A. Grant K.C. and *Church* for Gerard Fenwick. On the common sense of this will and the facts known to the testator at the time he executed it, it is clear that all the time he is thinking of his death, and that it is on that event he is charging the duties; he is not thinking of the far future. Where other gifts are given free of duty, the duty is presently payable. In the residuary clause he deals with the residue

(1) [1916] 2 Ch. 444. (2) (1917) 117 L. T. 422.
(3) [1921] 1 Ch. 601.

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just as if it were a legacy like the other legacies. These trusts might last forty or fifty years, and it can hardly be contended that the testator contemplated that his son's legacy should be held up all that time. At the time of the testator's death no such future duty as is now imposed under s. 14 of the Finance Act, 1914, existed. The fund is a deduction from a presently payable legacy, and ought to be presently ascertained. The direction to sell so many of the shares as would be sufficient to pay the duties could not be meant for future payments. The trust of the residue of the fund for his son absolutely would be futile, if the fund were to be held up indefinitely. It is the executors who are directed to sell these shares, but it is not the executors who are liable for this estate duty. This case is governed by *In re Wedgwood.* (1)

Galbraith K.C. and *Gavin Simonds* for the testator's widow.

SARGANT J. The Court has quite definitely laid down that a question such as that raised by this summons must be determined on the construction of each particular will, but that does not mean that one is debarred from seeking assistance from the reasoning which the Courts have employed in construing bequests of a similar character.

At the time the testator made his will, and at the time of his death, the Finance Act of 1914 had not been passed, and at that time settlement estate duty was payable in the case of settled property. Under the Finance Act, 1914, settlement estate duty was repealed, and in lieu of it estate duty was charged in the case of settled property on the reversions falling into possession, except in the case of a reversion falling in after a life interest to a testator's wife. That is roughly the result of that legislation, and, therefore, under that legislation the residuary estate will undoubtedly be liable in future to estate duty on the deaths of Mrs. Cartwright and Mrs. Rich. Apart from that, all the duties which became payable by virtue of the dispositions of the testator's will were presently payable.

(1) [1921] 1 Ch. 601.

Dealing first of all with the words "Free of all duties" as used in the gift of the residue, those words in themselves do not seem to me to be conclusive. They may apply only to the duties which will be payable on the handing over of the fund to the trustees by the executors, or they may apply to the further duties which will become payable by virtue of a devolution of the beneficial interest amongst the successive beneficiaries. Prima facie I think the words "Free of all duties" when used with regard to a fund, and not expressed to be with regard to successive interests in the fund, or with regard to the interests of beneficiaries in the fund, would be satisfied by applying them to the duties which would be paid at the time when the fund was handed over, and need not be extended so as to include the duties which will be payable on a subsequent devolution; because it is the fund that is being dealt with and considered. The fact that in one case the legacy may be absolute, and in the other case the legacy may give successive interests, does not necessarily extend the meaning of the words "Free of all duties" in the second case to the different interests in the fund and the duties becoming payable by virtue of the devolution of the beneficial interest.

But of course the words "Free of all duties" have to be looked on and construed, as in the other cases, with reference to any context, and here in particular with reference to clause 7. As far as the extent of the duties is concerned it would be difficult to find words which are wider than the words in clause 7; every kind and description of duty is to be paid under those words. But as far as regards the time or times at which the duties are payable and ascertained the words do not seem to me to be conclusive. The words "shall be liable" are compatible with the direction of the testator's mind either to the time of his death only, or to a series of times after his death, and the question which of those meanings is to be applied to the words is a question of construction.

I recognize that the testator has shown a deliberate intention to free his property from duties speaking generally, but

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that does not necessarily mean that he also frees the successive interests in particular properties from duties. The words of clause 7 are rather better applicable to, or rather more consistent with, one definite, immediate process than with a succession of processes. The words are not "Upon trust from time to time to sell so much as shall be sufficient." The words are "Upon trust to sell," and it is to be noted that in cases of this kind the burden of proof lies on the legatee to show that he or she takes the legacy free of duties. Every duty that was known to the testator at the time of his will, including the settlement estate duty, was a duty which was presently payable, and the fact that the settlement estate duty was especially mentioned in the will does not necessarily show that the testator was contemplating anything unusual, and certainly not that he was contemplating a postponed payment. Nor do I think that the substitution of this new estate duty for the settlement estate duty can be any reason in favour of that duty becoming payable in lieu of the settlement estate duty.

Further, there is this to be noted, and I attach considerable importance to it, that the shares in question are shares on which there is a very large liability. If the duties that were payable were to extend to all duties that might thereafter become payable, and were not intended to be duties ascertainable immediately or within a very short time, the result would be that under the provisions of the will all the shares in Lloyds Bank, less 2000, would have to be held by the trustees with this liability upon their shoulders. I should think there are very great objections to Lloyds Bank themselves, as trustees, holding the shares of Lloyds Bank. That, as it seems to me, is some indication that what the testator is regarding is a fairly immediate process, and not one which will be protracted over an indefinite period of time. I think too that there is very great force in what was said by Warrington L.J. in *In re Wedgwood* (1), where he calls attention to the fact that the estate duty is a duty which is not payable by the executors, and is entirely outside the dispositions

(1) [1921] 1 Ch. 601, 618.

of the testator's will. And further the Master of the Rolls makes remarks to this effect, that although each will has to be construed by its own particular language, still if the result of one construction is to impose a very heavy burden and one that is difficult of calculation, and the other construction is to result in something workable, then in case of there being nothing to choose between the two, the Court would lean towards the second construction rather than the first, a view which again imposes the burden of making out their case on those who seek to apply the unworkable, difficult construction of the will. And in the result the tendency of the Courts is to arrive practically at the conclusion reached by Eve J. in *In re Snape* (1), though not for quite the same reasons.

On the whole I have come to the conclusion here that what the testator was contemplating by clause 7 was an immediate process under which these shares were to be sold and applied in paying duties which were presently payable, and under which, after those duties had been paid, the residue of the shares or the proceeds were to be handed over to the son, Mr. Gerard Fenwick, and I am glad to find that I have come to the conclusion that what was done, in fact, by the trustees was right.

Solicitors: *Walfords; Stuart & Tull.*

(1) [1915] 2 Ch. 179.

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In re DUKE OF SUTHERLAND.

CHAPLIN *v.* LEVESON-GOWER.

[1922. S. 1759.]

Revenue—Estate Duty—Incidence—Settled Legacy—"Free from all death duties"—New Duty imposed after Death of Testator—Allowance in Respect of Settlement Estate Duty with Interest—Finance Act, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 14.

By his will dated January 28, 1913, a testator bequeathed a sum of 150.000*l.* to trustees upon trust for his son for life and subject thereto upon trusts for his issue as therein mentioned. He bequeathed his residuary personal estate to his trustees upon trust for conversion but with power to postpone the same. By clause 43 of his will he declared "that all the legacies and annuities and all other gifts bequests and devises therein contained shall be free from all death duties . . . . And I direct that such death duties shall be paid out of my residuary estate." By clause 47 he directed his trustees out of the moneys to arise from the conversion of his residuary personal estate to "pay any funeral and testamentary expenses debts the legacies and annuities bequeathed by this my will or any codicil hereto and the death duties whether payable in respect of my estate . . . . or any of the legacies or annuities bequeathed free of legacy duty." The testator died on June 27, 1913, and settlement estate duty was paid out of residue in respect of the 150,000*l.* fund. The testator's son died on April 28, 1921:—

Held: (1.) that the estate duty payable under the Finance Act, 1914, s. 14, on the death of the son in respect of the 150,000*l.* fund was payable out of that fund and not out of residue.

In re Wedgwood [1921] 1 Ch. 601 applied.

In re Parker (1917) 117 L. T 422; 86 L. J. (Ch.) 766 distinguished.

(2.) That the amount already paid for settlement estate duty would be allowed under s. 14 of the Finance Act, 1914, against the sum chargeable against the 150,000*l.* fund for estate duty; and that the further allowance of 3 per cent. per annum interest on the settlement estate duty would enure for the benefit of those who would have received it, had that duty been added to the 150,000*l.* fund.

ADJOURNED SUMMONS.

The following statement of the facts is substantially taken from the judgment of Sargant J.:—

The testator, the late Duke of Sutherland, made his will on January 28, 1913, and thereby appointed the Hon. Eric Chaplin, the present Duke of Argyle, and the Hon. Sir Arthur Lawley executors and trustees, and after other dispositions

he bequeathed to his trustees the sum of 150,000*l.* upon trust as thereinafter declared for the benefit of his son, the Hon. Alistair St. Clair Leveson-Gower. By clause 29 of the will the testator declared the trusts of the sum of 150,000*l.* as follows: he directed investment, and he directed his trustees to pay the income thereof to Lord Alistair during his life, and after his death he directed his trustees to stand possessed of the sum of 150,000*l.* and the investments for the time being representing the same upon trust for Lord Alistair's children or their children as he should appoint, and in default and subject to any such appointment the testator directed his trustees to stand possessed of the aforesaid fund upon trust for any children of Lord Alistair who being a male should attain the age of twenty-one or being a female should attain that age or marry. The testator gave Lord Alistair power by deed or will to appoint to any wife of his who should survive him a life interest in all or any part of the trust fund to commence from the death of Lord Alistair. By clause 44 the testator devised all his real estate not otherwise disposed of to his trustees with power of sale; and by clause 45 he bequeathed his residuary personal estate to his trustees upon trust for sale calling in and conversion but with power to postpone such sale calling in and conversion. Then by clauses 57 and 58 of his will the testator declared that his trustees should stand possessed of his residuary personal estate and his residuary real estate, subject as therein mentioned, upon trust to make certain payments out of the rents, profits and income thereof, and subject thereto during the life of the defendant, the present Duke of Sutherland, to pay all or any part of the residue from such net profits or income or apply the same to a limited class of persons; and then during the term of twenty-one years from the death of the testator they were to accumulate the surplus of the rents and profits and to hold the accumulated funds as if they were capital moneys forming part of his residuary personal estate. By clause 58 he directed that the residuary estate should be held upon the trusts with regard to the

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Lilleshall Estate, a settled estate settled by an existing settlement.

By clause 43 of his will the testator declared: "that all the legacies and annuities and all other gifts bequests and devises herein contained shall be free from all death duties and from all interest thereon and from all other moneys payable in lieu of such interest And I direct that such death duties shall be paid out of my residuary estate and such interest and other moneys out of the income of my residuary estate." And by clause 47 he directed that his trustees should out of the moneys arising from the sale calling in and conversion of or forming part of his residuary personal estate "pay my funeral and testamentary expenses debts and the legacies and annuities bequeathed by this my will or any codicil hereto and the death duties whether payable in respect of my estate or my wife's jointures or any of the legacies or annuities bequeathed free of legacy duty." Then by clauses 48 and 49 of the will he made provision under which the payment of the settled legacy of 150,000*l.* and two other settled legacies of 100,000*l.* and 25,000*l.* respectively might be deferred, and also made provision under which there might be an appropriation of parts of his residuary estate for the purpose of satisfying those settled legacies. The testator made three codicils to his will. The only codicil it is necessary to mention is the second codicil and that part of the second codicil which relates to certain Canadian property of the testator. By that codicil he provided that his Canadian estate should be sold to a company, and his trustees should stand possessed of the purchase price as to one-fourth part upon the same trusts in favour of Lord Alistair's issue and others as were declared by the will concerning the legacy of 150,000*l.* so that that went by way of the same trusts, by way of accretion to the settled legacy of 150,000*l.*

The testator died on June 27, 1913, and on January 15, 1915, the trustees paid the settlement estate duty on the sum of 150,000*l.* with interest at 3 per cent. from the death. Then on November 8, 1919, Lord Alistair appointed

out of the income of the 150,000*l.* a sum amounting to 1500*l.* to his widow during her life. On April 28, 1921, Lord Alistair died.

On April 4, 1922, the trustees took out this summons asking (1.) whether the amount of estate duty payable upon the death of Lord Alistair in respect of the trust legacy of 150,000*l.* and the property representing the one-fourth share of the testator's Canadian estate was payable out of such properties respectively or out of the residuary estate of the testator; (2.) whether the amount of settlement estate duty paid out of the residuary estate upon the testator's death in respect of the trust legacy of 150,000*l.*, which by virtue of s. 14 (*b*) of the Finance Act, 1914, was to be allowed against the amount of estate duty payable on the death of Lord Alistair in respect of the same property, ought to be attributed to the trust legacy or to be refunded to the residuary estate; and (3.) whether the interest payable by virtue of s. 14 (*b*) of the Finance Act, 1914, on the amount of the settlement estate duty for the period from August 15, 1914, to April 28, 1921, the date of Lord Alistair's death, ought to be treated as payable to and forming part of the estate of Lord Alistair or as income of the residuary estate.

Greene K.C. for the trustees.

MacSwinney for an infant child of Lord Alistair. The estate duty payable in respect of the 150,000*l.* fund on the death of Lord Alistair by virtue of s. 14 of the Finance Act, 1914, is payable out of residue in view of the direction in clause 43 of the will that "all the legacies and annuities and all other gifts bequests and devises herein contained shall be free from all death duties." That applies in terms to the duties payable upon the persons entitled in reversion to a settled legacy taking. The words "gifts bequests and devises" are wide enough to include every beneficial gift. This view is assisted by clause 47 of the will. Special reliance is placed on the words "shall be free from all death duties," and they suffice to throw the burden of the duty on the

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residue: *In re Hatch* (1); *In re Stoddart* (2), where however the words were "to be paid and enjoyed free of all death duties"; *In re Tinkler.* (3) *In re Eve* (4) closely resembles this case.

[SARGANT J. Are there any words here pointing to payment of duties during the enjoyment of a settled legacy?]

The words "shall be free from all death duties" are wide enough to include a duty payable during the enjoyment of a settled legacy: *In re Parker.* (5) The language in the will construed in *In re Palmer* (6) is different and *In re Wedgwood* (7) depends on the words "shall be paid free of all death duties," which are far less wide than the expression "shall be free from all death duties." This case most closely resembles *In re Parker* (5), on which reliance is placed.

If, however, the Court should hold that the estate duty on Lord Alistair's death is payable out of the 150,000*l.* fund the question arises whether that fund or the residuary estate which paid it gets the benefit of the allowance in respect of settlement estate duty and the interest thereon given by s. 14 (*b*) of the Finance Act, 1914. (8) The words of the section

(1) [1916] W. N. 240; 86 L. J. (Ch.) 454.

(2) [1916] 2 Ch. 444.

(3) [1917] 1 Ch. 242.

(4) [1917] 1 Ch. 562.

(5) 117 L. T. 422; 86 L. J. (Ch.) 766.

(6) [1916] 2 Ch. 391.

(7) [1921] 1 Ch. 601.

(8) Finance Act, 1914, s. 14: "Any relief from the payment of estate duty given by sub-section 2 of section 5 or by sub-section 1 of section 21 of the Finance Act, 1894, ... shall cease in the case of any person dying after the fifteenth day of August nineteen hundred and fourteen, ... Provided that— . . . . (*b*) on the first occasion on which estate duty becomes payable in respect of any property which would not have been payable but for this section, the amount of settlement estate duty, if any, which has been paid in respect of that property, shall be allowed against the amount of estate duty payable on that occasion, ... and in addition, a sum equal to simple interest on the said amount of settlement estate duty . . . . shall be paid to the several persons or their representatives who would have been entitled to the income arising from that amount, if that amount had on the fifteenth day of August, nineteen hundred and fourteen, been added to the capital of the settled property and shall be divided amongst those persons or their representatives according to the several interests they would have had in that income; . . . ."

make it clear that it is an allowance " of the amount of settlement estate duty . . . . which has been paid in respect of " the 150,000*l.* fund and the allowance is one made to that fund: see *In re Booth.* (1) The interest on the settlement estate duty goes under s. 14 (*b*) " to the several persons or their representatives who would have been entitled to the income arising from that amount " if it had " been added to the capital of the settled property " on August 15, 1914.

Harman for the tenant for life of residue. The words of clause 43 of the will cannot be construed without taking into account clause 47, which provides that the trustees are out of residue to " pay . . . . the death duties whether payable in respect of my estate . . . . or any of the legacies or annuities bequeathed free of legacy duty." That points to one operation and shows that the words " shall be free " in clause 43 have nothing to do with any further period beyond the testator's death. It is material also that the testator provides for the severance of the settled legacies from his estate after which they would no longer be legacies but trust funds, The only difficulty here is created by *In re Parker* (2), but in *In re Wedgwood* (3) it was treated as a very special case. The words in *In re Parker* (2) were stronger than here. *In re Wedgwood* (3) is in point, and Lord Sterndale M.R. there pointed out that " the natural time to ascertain the meaning of the words 'free of all death duties' is when the legacies are paid in the sense of having been transferred out and out from the testator's estate. . . . . If it be intended to postpone this date to that of payment or transference to the ultimate beneficiary words should be used clearly expressing that intention." Here there are no such words.

The further question as to the allowance in respect of settlement estate duty and the interest thereof does not seem arguable. Under the clear words of the section the allowance of duty goes to the 150,000*l.* fund and the interest to those interested in that fund as income

Cur. adv. vult.

(1) [1916] 1 Ch. 349. (2) 117 L. T. 422.
(3) [1921] 1 Ch. 601, 615.

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July 13. SARGANT J. delivered the following written judgment: The main question here is one of a class that is continually arising on the construction of wills—namely, whether general words of exemption from death duties cover the estate duty payable on a devolution of the beneficial interest in a settled legacy. [His Lordship stated the facts and continued:] On the event of Lord Alistair's death on April 28, 1921, estate duty became payable under s. 14 (*b*) of the Finance Act, 1914, an Act which was passed after the will and after the death. The question is how is that estate duty to be borne. Is it to be borne by the settled legacy or by the residue? Is there any direction under which the residue is to exonerate the settled legacy from the payment of that estate duty? This question has to be determined on the language of the particular will in question, as was pointed out in *In re Palmer*. (1) But assistance may of course be derived from the reasoning employed by the Courts, and particularly of course by the appellate Courts in cases of the like nature.

Mr. MacSwinney on behalf of those interested in the settled legacy has urged that the words "gifts bequests and devises" in clause 43 are sufficiently wide to cover not merely the capital amounts of this legacy of 150,000*l.* and of two other legacies of 100,000*l.* and 25,000*l.* given and settled by the will, but also the successive interests therein of the individual beneficiaries; and further that the words "shall be free of all duties" (which happen to be the precise words in *In re Parker* (2)) are words capable of denoting a continuing exoneration of these successive interests from death duties. And no doubt there is a good deal of force in his argument. But on the other hand, I think the words "gifts bequests and devises" may quite well be satisfied by being applied once and for all to the whole subject matter of any bequest, whether settled or not; and again that in the phrase "shall be free of all duties" the words of futurity need not necessarily refer to any later date than the administration following the death of the testator, or to any larger subject matter

(1) [1916] 2 Ch. 391. (2) 117 L. T. 422; 86 L. J. (Ch.) 766.

than the duties then payable. The language of clause 43 then being ambiguous, can any assistance in determining the ambiguity be derived from clause 47 of the will? I think it can. It seems to me that the language of clause 47 most naturally refers to a single set of operations taking place shortly after the testator's death and in the immediate administration of his estate, and cannot without some straining be construed to include prospective payments not due or ascertainable till one or more generations after the testator's death. Debts funeral and testamentary expenses and legacies have all to be paid forthwith, except so far as a special power of postponing legacies is given by clause 48; and annuities though continuing involve immediate and ascertained payments. Further, unless a very special meaning is given to the word "legacies" in this clause, the death duties referred to in it are, on the face of the words used, death duties that are immediately payable. And there is not in this clause or in any other part of the will any direction to "provide for" as distinguished from "paying" death duties such as might have been expected, had the testator intended to exonerate the settled legacies from possible prospective duties at the expense of residue. There seems to me also to be some force in the argument of Mr. Harman that the power in clause 49 of the will to appropriate parts of the testator's estate to answer the three settled legacies of 25,000*l.*, 100,000*l.* and 150,000*l.* tends in the same direction. It would be a curious result, if, after this appropriation had taken place, the persons entitled to reversionary interests in the appropriated funds could still look for exoneration against death duties to the remaining parts of the residuary estate.

Finally, as I remarked in a very recent case of *In re Fenwick* (1), it is for the legatees who seek the benefit of this extended exoneration to establish affirmatively that the words used give them this benefit. And as was said by the Master of the Rolls in *In re Wedgwood* (2), although each will has to be construed by its own particular language, still if

(1) Ante, p. 775. (2) [1921] 1 Ch. 601.

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the result of one construction is to impose a very heavy burden and one that is difficult of calculation, and the other construction is to result in something workable, then in the case of there being nothing to choose between the two, the Court would lean towards the second construction rather than the first; which again imposes the burden of making out their case on those who seek to apply the unworkable difficult construction to the will.

In re Parker (1) was a case in which there were special reasons for arriving at a different result. Not only was the will there made after the passing of the Finance Act, 1914 (a circumstance to which I do not attach very much importance), but there was a direction to pay death duties on annuities and the only annuity given was a reversionary one the duty on which would necessarily have to be provided for and met prospectively. In my judgment *In re Parker* (1) was an exceptional case decided on its own special circumstances, and the recent case of *In re Wedgwood* (2) was one of a much more ordinary character and therefore of greater general applicability. And applying to the present case the general reasoning of the Master of the Rolls and Warrington L.J. in that case, I am confirmed in the result at which I had already arrived on the language of the particular will now in question—namely, that the estate duty in question has to be borne by the 150,000*l.* legacy itself.

As regards the fourth share of the testator's Canadian estate settled by clause 5 of the second codicil to his will the same result of course obtains. That share has to bear its own estate duty on the death of Lord Alistair.

The subsidiary questions raised by the summons present no difficulty. The amount already paid for settlement estate duty will be allowed against the sum now chargeable against the 150,000*l.* fund for estate duty. And the further allowance of 3 per cent. per annum for interest on that settlement estate duty will enure for the benefit of those who would have received it had that duty been added to the 150,000*l.* fund —that is, in the main, to the estate of Lord Alistair.

(1) 117 L. T. 422; 86 L. J. (Ch.) 766. (2) [1921] 1 Ch. 601.

This gives an undue advantage to the estate of the first tenant for life, since that estate will be receiving income on a sum which in the future will form no part of the settled fund; but the words of the statute are express and leave no room for a really accurate adjustment of the position as between income and capital.

Solicitor for all parties: *W. Silverwood Cope, for A. N. Macaulay & Co., Golspie.*

H. C. G.

Distinguished. GEORGE *v.* TOMPSON'S TRUSTEE. [1949] 1 All E.R. 554. *Considered.* GEORGE *v.* TOMPSON'S TRUSTEE. [1949] 1 Ch. 322

In re FAIRLEY.

[62 of 1921.]

Bankruptcy—Execution—Completion—Partial Levies—Levy for Balance—Return of Nulla Bona—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *ss.* 37, 40, 41.

On January 14, 1921, the sheriff, in executing a writ of fi. fa. for 144*l.*, levied on the debtor's goods, but on January 29 being paid 72*l.* on account of the debt in addition to costs, fees and possession money, he withdrew by arrangement reserving a right of re-entry for the 72*l.* balance. He retained the 72*l.* received on account for fourteen days and then paid it to the execution creditors.

On March 16 the sheriff made a second levy, but on being paid 53*l.* on account of the debt in addition to fees and possession money, he again withdrew reserving a right of re-entry for the 19*l.* balance. After retaining the 53*l.* for fourteen days he paid it to the execution creditors.

On April 26 the sheriff made a third levy, but the goods seized being found on interpleader to belong to a third party, he finally withdrew and made a return of nulla bona on May 2.

On September 8 a petition in bankruptcy based on an act of bankruptcy of August 19 was presented. A receiving order was made on September 29 followed by an adjudication on October 1 and an order for summary administration on October 3:—

Held, that the execution was completed within ss. 40, 41 of the Bankruptcy Act, 1914, by the return of nulla bona on May 2, and the trustee had no title to the 72*l.* and 53*l.* realized by that completed execution.

In re Godding [1914] 2 K. B. 70 and other cases cited therein discussed.

Whether the trustee would in any case have been entitled to the moneys paid before June 8, the earliest possible date to which his title could relate back under s. 37, *quaere.*

APPEAL from Birmingham County Court.

In January. 1921, the appellants having obtained judgment

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against Fairley for 144*l.*, lodged a writ of fi. fa. with the sheriff.

On January 14 the sheriff levied on the debtor's goods, but on January 29, having been paid 72*l.* on account of the debt, in addition to costs, fees and possession money, he withdrew by arrangement reserving a right of re-entry for the 72*l.* balance. He retained the 72*l.* for fourteen days and then paid it to the appellants.

On March 16, 1921, the sheriff made a second levy, but on being paid 53*l.* on account of the debt in addition to fees and possession money, he again withdrew reserving a right of re-entry for the 19*l.* balance. After retaining the 53*l.* for fourteen days he paid it to the appellants.

On April 26, 1921, the sheriff made a third levy, but the goods seized being found on interpleader to belong to a third party, he finally withdrew and made a return of nulla bona on May 2.

On September 8 a petition in bankruptcy based on an act of bankruptcy of August 19 was presented. A receiving order was made on September 29 followed by an adjudication on October 1 and an order for summary administration under s. 129 of the Bankruptcy Act, 1914, on October 3, the official receiver being the trustee in the bankruptcy.

On December 17, 1921, the trustee claimed the two amounts paid to the appellants amounting to 125*l.*, and on April 7, 1922, he issued a notice of motion in the Birmingham County Court to enforce his claim.

On May 23, 1922, the county court judge held that the trustee was entitled to the money on the ground that the execution was never completed by seizure and sale within s. 40 of the Bankruptcy Act, 1914 (1), but was only a partial

(1) The Bankruptcy Act, 1914, provides as follows:—Sect. 37, sub-s. 1: "The bankruptcy of a debtor . . . . shall be deemed . . . . to have relation back to, and to commence at, the time of the first of the acts of bankruptcy . . . . committed . . . . within three months next preceding . . . . the bankruptcy petition."

Sect. 40, sub-s. 1: "Where a creditor has issued execution against the goods . . . . of a debtor . . . . he shall not be entitled to retain the benefit of the execution . . . . against the trustee in bankruptcy . . . .

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execution within *In re Ford.* (1) He did not think that s. 40 was in any way limited by s. 37, the "relation back" section. Nor did he think that the return of nulla bona to the third levy had the effect of completing an otherwise incomplete seizure and sale. He also failed to see that s. 41 relating to the duties of sheriffs in the case of goods taken in execution had any application: see *In re Godding* (2) and *In re Evans.* (3)

On June 13, 1922, the appellants gave notice of appeal on two grounds: (*a*) that the trustee's title was limited by s. 37 and did not relate back before June 8, 1921; and (*b*) that the return of nulla bona on May 2 completed the execution.

Hon. R. W. Coventry K.C. and *G. W. H. Jones* for the appellants. The appellants received their 125*l.* long before June 8,

unless he has completed the execution . . . . before the date of the receiving order, and before notice of the presentation of any bankruptcy petition . . . . or of the commission of any available act of bankruptcy. . . . ."

Sub-sect. 2 "For the purposes of this Act, an execution against goods is completed by seizure and sale."

Sect. 41, sub-s. 1: "Where any goods . . . . are taken in execution, and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made . . . . the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver. . . . ."

Sub-sect. 2. "Where, under an execution in respect of a judgment for a sum exceeding 20*l.*, the goods . . . . are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution . . . . and retain the balance for 14 days, and, if within that time notice is served on him of a bankruptcy petition . . . . and a receiving order is made . . . . the sheriff shall pay the balance to the official receiver. . . . ."

Sect. 45. "Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution . . . . nothing in this Act shall invalidate . . . . (*a*) any payment by the bankrupt to any of his creditors . . . . provided . . . . (i.) that the payment . . . . takes place before the date of the receiving order; and (ii.) that the person . . . . to . . . . whom the payment . . . . was made . . . . has not at the time of the payment . . . . notice of any available act of bankruptcy committed . . . . before that time."

(1) [1900] 1 Q. B. 264.

(2) [1914] 2 K. B. 70.

(3) [1916] Current Digest, 55; 2 H. B. R. 111.

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1921, the earliest possible date to which the trustee's title could relate back, so that even if the execution as a whole were still incomplete, the trustee could not claim the 125*l.*

But the whole execution was obviously completed on May 2 by the return of nulla bona to the third levy. There was nothing in the nature of an incomplete execution left remaining after that, and Channell J.'s test in *In re Ford* (1) is satisfied.

Tindale Davis for the trustee. Sect. 40 is in no way limited by the relation back provisions of s. 37; nor is this a protected transaction within s. 45.

[ASTBURY J. Suppose, for the moment, that you are right on that point. Why is not this execution complete?]

An execution can only be completed under s. 40 by seizure and sale. Under s. 41 it can either be completed by sale or by the receipt or recovery of the full amount of the levy. These are the only statutory modes of completion: *In re Godding* (2); *In re Evans* (3); *Figg* v. *Moore* (4); *Burns-Burns* v. *Brown* (5); *In re Pollock.* (6)

Now here there was no sale, and the full amount of the levy was not received or recovered. The execution is therefore incomplete in the statutory sense, and the trustee is entitled to the payments made on the partial levies.

Hon. R. W. Coventry K.C. in reply. The dicta to the effect that seizure and sale or recovery of the full amount of the levy are the only modes of completing an execution were merely obiter and quite unnecessary to the decisions.

For instance, in *In re Godding* (2); *In re Evans* (3) and *In re Pollock* (6) the bankruptcy ensued within the fourteen days, so the trustee was of course entitled. In *Figg* v. *Moore* (7) and *Burns-Burns* v. *Brown* (8) the sheriff held the goods for twenty-one days before he was paid out, an act of bankruptcy of which the execution creditors necessarily had notice.

(1) [1900] 1 Q. B. 264, 268.
(2) [1914] 2 K. B. 70, 74.
(3) [1916] Current Digest, 55; 2 H. B. R. 111.
(4) [1894] 2 Q. B. 690, 692.
(5) [1895] 1 Q. B. 324, 326.
(6) (1902) 87 L. T. 238; 18 Times L. R. 794.
(7) [1894] 2 Q. B. 690, 693.
(8) [1895] 1 Q. B. 324, 327, 328.

In *In re Jenkins* (1) on the other hand where the execution was withdrawn on receipt of money and goods of smaller value than the levy but accepted in full discharge, and the money was held for the fourteen days the execution was held complete.

ASTBURY J. [after stating the facts:] The present bankruptcy could not possibly have related back beyond June 8, and long before that this execution had been determined, the sheriff had made a complete return to the writ, and had retired finally.

The question raised by the trustee, and in regard to which the learned judge below gave judgment in his favour, was whether he was entitled to recover the 125*l.* paid to the appellants. The trustee contends that his right to recover this money arises under s. 40 of the Bankruptcy Act, 1914. [His Lordship read the section and continued:] The trustee suggests that unless there is a sale following a seizure the execution cannot be completed within the meaning of that section. That is plainly inaccurate, as in the very next section (41) "receipt or recovery of the full amount of the levy" is described as a completion of the execution. It is plain therefore that in s. 40 the definition, or so-called definition, in sub-s. 2, is not an exhaustive definition, but a mere description of one of many ways in which an execution can be completed.

Now the main and substantive object of s. 40 is to prevent a judgment creditor retaining the benefit of a partially finished execution if a bankruptcy intervenes, and it enacts that unless the execution is completed it shall not be good as against the trustee. The trustee's contention pushed to its logical conclusion would lead to an absurd result. If an execution had been issued nineteen years before a bankruptcy, and the execution creditor had been paid the greater part of his money by arrangement and the sheriff had retired but without any seizure and sale the moneys could have been recovered in the long subsequent

(1) (1904) 90 L. T. 65; 20 Times L. R. 187.

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bankruptcy. I do not believe that that is the meaning of the section at all.

There are certain decisions which are relied upon by the trustee in support of this contention.

The first, which refers to earlier decisions, is a decision of Horridge J. in *In re Godding.* (1) In that case goods of a debtor were seized in execution, and to avoid a sale he paid the full amount of the levy direct to the execution creditor, and he also paid the charges of the sheriff, who withdrew by direction of the execution creditor, and nine days afterwards the debtor became bankrupt. It was held by the learned judge that the execution had not been completed and that the creditor could not, as against the trustee in bankruptcy, retain the money which had been paid to him. I do not desire to discuss the merits of that decision, but it is perfectly obvious that it was not a case where there had been an execution which had come to an end and been completely terminated by a full return to the writ before the bankruptcy.

Horridge J. discusses *In re Ford* (2); *In re Jenkins* (3) and *In re Pollock* (4); but relies principally on *Figg* v. *Moore* (5) and *Burns-Burns* v. *Brown.* (6)

In *In re Ford* (2), an execution having been issued upon a judgment for 80*l.* and costs, the sheriff on December 31, 1898, levied under a writ of fi. fa. On January 5, 1899, the debtor, under an arrangement with the solicitors of the execution creditors, paid the solicitors a sum of 40*l.* on account, and gave to the sheriff authority to re-enter under the writ of fi. fa. upon default in payment of any of the instalments of the balance at the agreed dates for payment. The sheriff thereupon withdrew. On January 14 a receiving order was made against the debtor on his own petition. At that date the sheriff had not re-entered under the writ of fi. fa. It was held that the execution had not been completed, even as to the 40*l.* paid on account.

(1) [1914] 2 K. B. 70.
(2) [1900] 1 Q. B. 264.
(3) 90 L. T. 65; 20 Times L. R. 187.
(4) 87 L. T. 238; 18 Times L. R. 794.
(5) [1894] 2 Q. B. 690, 692.
(6) [1895] 1 Q. B. 324, 326.

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I do not see how it could possibly have been held otherwise. The sheriff withdrew under a distinct arrangement that he could go in again, and before he had re-entered, before the debt was paid off or the execution terminated, the bankruptcy supervened.

In that case Wright J. said (1): "There was no release of any specific portion of the debtor's goods; had there been, there might have been some substance in an argument that as to those particular goods the execution had been completed; the sheriff, however, under the arrangement was entitled to re-enter upon the whole of the goods. Under the circumstances, I am unable to see how the execution can be held to have been completed when the Act requires both seizure and sale to exist before completion"—that is, I presume, seizure and sale in pursuance of the execution—"I am not aware of any other mode of completion of an execution; if there be one, it certainly was not accomplished in the present case."

Channell J. said (2): "If there has been only a partial execution, a levy and no subsequent completion, the intention of the Act apparently is that the other creditors may step in and insist on having the whole of the debtor's estate rateably divided. The test seems to be whether or no the execution has been partial only—that is, whether or no a partial benefit has been obtained from it; if the execution is in that sense incomplete, the general body of creditors are entitled to have the property distributed rateably"—that means, I understand, property which is in course of being taken in execution—"This is what the section says when it provides that, unless before the date of a receiving order the execution is completed (which is defined as meaning completed by seizure and sale), the execution creditor is not to retain the benefit of his execution. It seems that if the execution creditor gets a partial benefit (here he got 40*l.* on account), but retains anything in the nature of an incomplete execution, then he cannot retain the partial benefit which he has already received. If the respondents in the

(1) [1900] 1 Q. B. 267. (2) [1900] 1 Q. B. 268.

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present case had accepted the 40*l.* in full satisfaction of the debt and had not claimed a right to re-enter at some subsequent time and go on with the execution, then I think they might have retained the 40*l.*; it would have been the same as though instead of 40*l.* they had received the whole 80*l.* through the sheriff, which they clearly might have kept. But they claimed to have the benefit of an execution which was kept standing over, and which was incomplete, and the section means that where the execution creditor is taking such a benefit the general creditors may come in if they can avail themselves of any act of bankruptcy, and may have the property distributed rateably and prevent the execution creditor from getting any benefit from an execution which is only partial and incomplete."

That seems to me to be in accordance with the Act, and certainly in accordance with good common sense.

In *In re Jenkins* (1) an execution was levied at hotel A and hotel B. The execution creditor authorized the sheriff to withdraw from hotel A on payment of 20*l.* and to delay the sale at hotel B. The debtor then sold certain goods at hotel A to the execution creditor. The execution was not completed by seizure and sale, but was settled as follows: The debtor being credited with 58*l.* then in the hands of the sheriff, and with the goods sold to the execution creditor, paid the balance of the levy in cash to the execution creditor, who directed the sheriff to withdraw from hotel B also. The sheriff retained the 58*l.* in his hands for fourteen days and then paid it to the execution creditor. Eight days later a receiving order was made on the debtor's own petition. Wright J. held that the execution had been completed, the sheriff having retained the 58*l.* for fourteen days, and the other items and the cash payment being covered by the observations in *In re Ford*. (2) He said: "In substance the whole transaction was completed long before the date of the receiving order."

In *In re Pollock* (3), which was decided more than two years before *In re Jenkins* (1), the judgment is more difficult to

(1) 90 L. T. 65; 20 Times L. R. 187.
(2) [1900] 1 Q. B. 264.
(3) 87 L. T. 238; 18 Times L. R. 794.

follow. In that case the judgment and execution were on August 1, 1901. On August 9 the judgment debtors' solicitors paid the judgment creditors' solicitor a cheque for a portion of the judgment, which was received in full discharge of the debt, and on August 10 the sheriff was paid his poundage fees, costs and expenses, and retired, making a return to his warrants in these words: "Withdrew by order of the Plaintiffs' Solicitor. C. Roper." On August 17 a receiving order was made. It was held by the learned county court judge, whose judgment was confirmed by the Divisional Court, that the execution was not completed by this payment. On the facts of that case, I am inclined to think that the payment, being made by the debtors within the three-months' relation-back period, was a payment to the creditors of property which passed under the Act to the trustee, and the decision would be justified on that ground. As to the point upon which the case was decided, I should have thought that the execution was at an end, but it was at all events not determined by a complete and final return to the writ by the sheriff, as in the present case.

The two authorities upon which Horridge J. appears principally to have relied in *In re Godding* (1), and upon which the trustee relies before us, are *Figg* v. *Moore* (2) and *Burns-Burns* v. *Brown.* (3)

In *Figg* v. *Moore* (2) Vaughan Williams J., dealing with s. 45 of the Act of 1883 (now replaced by s. 40 of the 1914 Act), read sub-s. 1, and proceeded: "Sub-s. 2 says, that for the purposes of the Act an execution against goods is completed by seizure and sale, or—reading in s. 11 of the Bankruptcy Act, 1890" (now s. 41 of the present Act)—"receipt or recovery of the full amount of the levy." Horridge J. thought that that statement was intended to be comprehensive and exhaustive. I am not so sure myself whether that is right. The same remark applies to Lord Halsbury's statement in *Burns-Burns* v. *Brown.* (3) At all events, I do not think that either of those learned judges can have

(1) [1914] 2 K. B. 70, 74. (2) [1894] 2 Q. B. 690, 693.
(3) [1895] 1 Q. B. 324, 326.

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intended to say that an execution completed and terminated years before a bankruptcy can be held to be an uncompleted execution for the purposes of administering in bankruptcy the goods supposed ex hypothesi to be in process of execution or dealing with by the sheriff.

For these reasons I am of opinion that in the present case the execution was completed, terminated and non-existent at the date of the commencement of the present bankruptcy, that the judgment of the Court below was incorrect, and that this appeal should be allowed.

P. O. LAWRENCE J. I agree. The appellants rely upon two distinct points. The establishment of either entitles them to succeed on this appeal. The first point is that s. 40 of the Bankruptcy Act, 1914, does not come into operation unless the benefit of the execution has been received by the execution creditor within the time to which the trustee's title relates back under s. 37. The second point is that on the facts of the present case the appellants had completed the execution within the meaning of s. 40, sub-s. 1, and are therefore entitled to retain the benefit thereof.

On the first point, which has not been fully argued, I express no opinion.

On the second point I have formed a definite opinion in favour of the appellants. The learned county court judge has held that the execution was not completed. I think that on the admitted facts of the present case he was wrong in so holding. The trustee contends that *In re Godding* (1) and *In re Evans* (2), purporting to be founded on *Figg* v. *Moore* (3) and *Burns-Burns* v. *Brown* (4), decided that the only method by which the execution could be completed within the meaning of s. 40, sub-s. 1, was either by seizure and sale or by receipt or recovery by the sheriff of the full amount of the levy. But on looking at those cases, it does not appear to me that the point now before us was considered by any of the learned

(1) [1914] 2 K. B. 70.
(2) [1916] Current Digest, 55; 2 H. B. R. 111.
(3) [1894] 2 Q. B. 690, 692.
(4) [1895] 1 Q. B. 324, 326.

judges, nor can I find that their attention was in any way directed to it. It is true that the learned judges used language which, literally construed, might imply that those were the only two methods by which execution could be completed. But I cannot bring myself to believe that they intended to decide anything of the sort. In my opinion Channell J. in *In re Ford* (1) lays down the true test as to whether an execution is completed or not—namely, whether the creditor, having obtained a partial benefit from that execution, retains something in the nature of an incomplete execution.

An execution is no doubt incomplete if the sheriff has been induced, by payment on account or otherwise, to withdraw temporarily. Moreover the authorities seem to show that an execution may be incomplete, even though the sheriff withdraws permanently—e.g., where on payment of part of the debt in order to avoid a sale, the sheriff with the execution creditor's assent withdraws permanently. But that is not what has taken place here. It is true that the sheriff withdrew on the first two occasions without having recovered the full amount of the levy. But afterwards he made a third levy in order to complete the execution. He was then met with a claim to the goods. This claim was successful and it was established that the goods were not the debtor's. Thereupon he completed his execution in the only manner in which it could in the circumstances be completed—namely, by a return of nulla bona.

The learned county court judge relies upon *In re Ford* (1) as a decision strongly supporting his judgment. With the greatest deference, I do not think it does. On the contrary, I think the way in which Channell J. in that case approached the question is the true way of approaching it—namely, to find out whether the creditor retains anything in the nature of an incomplete execution at the date when the trustee asserts his title under the receiving order.

In the present case the execution was complete both in substance and in fact and the appellants do not retain

(1) [1900] 1 Q. B. 264, 268.

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anything in the nature of an incomplete execution; that being so, I am of opinion that there is nothing in s. 40, sub-s. 2, nor in s. 41, sub-s. 1, to prevent us from holding that the appellants had completed the execution within the meaning of s. 40, sub-s. 1. The appeal will be allowed.

Leave to appeal.

Solicitors: *Judge & Priestley, for Philip Cohen, Slater & Tompkins, Birmingham; Hicks, Arnold & Bender.*

G. R. A.

RUSSELL J. 1922 *July* 10, 11, 12.

SHEARS AND SONS, LIMITED *v.* JONES.

[1921. J. 2320.]

Bill of Sale—Agreement to execute—Contingent charge on Chattels—Equitable Security—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 8, 9.

An agreement to execute a bill of sale, to secure payment of a debt, in the event of the debt not being paid by a certain date, is a bill of sale within the meaning of the Bills of Sale Act 1882, and is void unless the requirements of that Act as to registration are complied with.

WITNESS ACTION.

The plaintiffs are a limited company, and the defendants are John William Jones and Theresa, his wife. On September 17, 1920, the plaintiffs obtained judgment against the defendant, John William Jones, for 1000*l.* and costs. On March 14, 1921, there remained due to the plaintiffs under the said judgment the sum of 811*l.* Shortly before March 14, 1921, the plaintiffs contemplated filing a bankruptcy petition founded on the judgment against John William Jones.

On March 14, 1921, the defendants entered into an agreement in the following terms with the plaintiffs: "In consideration of your forbearance at our request to proceed with the filing of a bankruptcy petition against the undersigned John William Jones, we hereby jointly and severally undertake and agree, in the event of your not receiving within two

calendar months from this date—(1.) The balance due to you on the judgment obtained by you in the King's Bench Division of the High Court of Justice [1920. G. 1789] on September 17, 1920, and (2.) the interest thereon and the costs incurred by subsequent proceedings between solicitor and client—to execute two several bills of sale for securing payment to you of the above-mentioned sums on the household furniture belonging to us severally at number 27 Porchester Road, Bournemouth. And we also jointly and severally undertake that in the event of any other creditor or creditors taking or threatening to take any legal proceedings against the said John William Jones this undertaking is to be of immediate effect without waiting for the remainder of the period of two months to expire and you are to be at liberty notwithstanding this undertaking to take such steps as you may consider advisable to enforce your judgment." This agreement was not registered as a bill of sale.

The bulk of the said furniture belonged to Theresa Jones, but she refused to execute a bill of sale in favour of the plaintiffs when the balance due remained unpaid after the expiration of the two months.

On July 6, 1921, a receiving order was made against John William Jones. On July 20, 1921, the writ in this action was issued claiming specific performance by Theresa Jones of the agreement to execute the bill of sale, and an order that both defendants should admit the plaintiffs' agents for the purpose of making an inventory. John William Jones put in no defence, and at the trial no relief was asked for against him.

Barrington-Ward K.C. and *Graham Mould* for Theresa Jones. The agreement of March 14, 1921, contains a covenant to execute a bill of sale to secure payment of the sum due in the event of it not being paid within two months. The agreement therefore gives an equitable title to the goods: *Edwards* v. *Edwards* (1); *Ex parte Mackay.* (2) By s. 4 of the Bills of Sale Act, 1878, the expression bill of sale includes

(1) (1876) 2 Ch. D. 291. (2) (1873) L. R. 8 Ch 643.

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"any agreement . . . . by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." The agreement therefore is a bill of sale, and, not being registered, as required by s. 8 of the Bills of Sale Act, 1882, nor in the form required by s. 9, it is void.

Courthope Wilson K.C. and *H. Watt Dollar* for the plaintiffs. The agreement does not give an equitable right to the chattels comprised in it and, not being a bill of sale within the meaning of s. 4 of the Bills of Sale Act, 1878, it does not require registration. In *Ex parte Mackay* (1) the agreement was relied on as an equitable assignment and therefore required registration; but, as Mellish L.J. pointed out, "quâ agreement, it does not require registration." There was no intention to charge the chattels by the agreement, and you can have no charge in equity without an intent to charge: *Hopkinson* v. *Forster*. (2) In *Edwards* v. *Edwards* (3) the deed provided that the property in question, as long as the money remained unpaid, should "stand and be charged and chargeable with the payment" by virtue of the deed, not under another document as here. As was pointed out by North J. in *Furnivall* v. *Hudson* (4): "If they refused to execute a proper bill of sale, the grantee might come to the Court for an order that they should execute it, ... What has been done is simply to displace by contract the necessity for coming to the Court for specific performance." This agreement gives no present charge but only provides that there shall be a charge on the happening of either one of two events. There are parallel cases under the Companies Acts, and, as Buckley J. said, when speaking of debentures, an agreement may be so expressed as to create a present equitable right to a security, in which case it must be registered under the Companies Acts, or so as to be merely an agreement that in some future circumstances a security shall in the future be created. In the latter case the agreement, not creating a present security, does not require registration: *In re Jackson*

(1) L. R. 8 Ch. 643.
(2) (1874) L. R. 19 Eq. 74, 75.
(3) 2 Ch. D. 291.
(4) [1893] 1 Ch. 335, 340.

& Bassford, Ld. (1) This is a contract to give me a bill of sale. If there is any question as to the form that bill of sale should take the Court will refer the matter to chambers.

RUSSELL J. It is contended on behalf of the defendant, Theresa Jones, that the agreement of March 14, 1921, is void, and also one which is incapable of specific performance, because specific performance cannot be obtained of an agreement to give a bill of sale. The agreement is in these terms [his Lordship read the agreement], and the first question I have to consider is whether, in substance, it is a bill of sale. It is conceded that if the agreement be a bill of sale within the meaning of the Bills of Sale Acts it is clearly void on a number of grounds.

I need not go into the matter in detail, but it suffices to say that s. 8 of the Bills of Sale Act, 1882, provides that a bill of sale shall be void unless it is registered within seven days of the execution thereof. This document was never registered. Now is this document a bill of sale within the meaning of the Bills of Sale Act, 1882? The definition section, which is s. 3, provides that "the expression 'bill of sale' and other expressions in this Act, have the same meaning as in the principal Act," with an exception that is immaterial for this purpose, and the principal Act, the Act of 1878, in s. 4, provides that the expression "bill of sale" shall include "any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." That must be read with the qualification to be found in s. 3 that the Act only applies to a bill of sale whereby the holder or grantee has power to take possession of the personal chattels comprised in it.

In my opinion this document is a bill of sale within the meaning of s. 4 of the Bills of Sale Act, 1878. It is a document which confers on the plaintiffs a right in equity to a contingent charge on the chattels. It confers that right because

(1) [1906] 2 Ch. 467, 476.

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it is a contract to give such a charge for valuable consideration, the contingency being the non-payment of the money within the period of two months.

It seems to me that this case is really covered by the decision of the Court of Appeal in *Edwards* v. *Edwards*. (1) That was a case which was decided under the old Act of 1854, the Court holding that the particular document in question was a bill of sale within the meaning of that Act, the definition clause of which was in very restricted terms, namely: "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels." The document there in question was a deed of July 1, 1869, made between one F. H. Edwards and the defendant. It recited an agreement for the purchase of certain premises, that 500*l.* should be paid down, and 7500*l.* allowed to remain on such security as was thereinafter mentioned. By the deed F. H. Edwards assigned to the defendant certain leasehold premises and the goodwill of a particular business, and by that same deed the defendant covenanted to pay to F. H. Edwards 7500*l.* on December 31, 1869. The deed further provided that if default should be made in the payment of the 7500*l.*, that is, if it was not paid on or before December 31, 1869, then the property in question should, as long as the 7500*l.*, or any part thereof, or any interest for the same, remained unpaid, stand and be charged and chargeable with the payment of the 7500*l.*, or so much thereof as should for the time being remain unpaid, and the interest thereon. Pausing there, that was a charge, given by the instrument, that was to arise upon the happening of a contingency. Then the instrument provided that the defendant, his executors, administrators, and assigns, if and when required to do so by F. H. Edwards, his executors, administrators, or assigns, would execute and do all such things as should be necessary or proper for granting and assigning the said premises respectively, and every or any part thereof, to F. H. Edwards, his executors, administrators, or assigns, for further securing the repayment to him or

(1) 2 Ch. D. 291, 295, 297.

them of the 7500*l.*, or so much as should for the time being remain unpaid, and the interest thereof.

That deed was not registered as a bill of sale. On the death of Mr. F. H. Edwards, his executors took proceedings to enforce their security, and asked for the appointment of a receiver. But, on August 4, 1875, after the receiver had been appointed but before he had given security, an execution creditor seized some of the chattels, and the question was whether the right of the execution creditor to seize the chattels prevailed over that of the mortgagee. It was held as regards the chattels that the deed was void, because it was a bill of sale within the Bills of Sale Act, 1854, and had not been registered. James L.J. does not give his reasons but proceeds on the footing that the document in question was a bill of sale. He says: "The question here is, who has the better right to certain chattels, a mortgagor whose bill of sale is not registered but who has obtained an order for a receiver, or an execution creditor of the mortgagor." Mellish L.J. is much more explicit. He says: "I am of the same opinion. The first point argued was that this is not a bill of sale within the meaning of the Act. I am of opinion that it was, and that on two grounds. In the first place, it is an instrument under seal charging the goods with the debts. If it did not pass the property in the goods, I am inclined to think that even at law it would be held to give a right to take possession of them as a security. In the second place, it contains a covenant to assign the goods when required, which clearly gives an equitable title to them, and we have held that equitable securities on goods are bills of sale within the meaning of the Act. The statute mentions declarations of trust, which shows that equitable titles are within its scope. I think that any equitable security which gives a right to take possession through the agency of the Court is within the Act."

That was a decision that an agreement to assign chattels on the happening of a particular contingency clearly gave an equitable title to the goods, and was a bill of sale within the narrow definition contained in the Bills of Sale Act, 1854. It appears to me a fortiori that the document in question in

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this case, which is an agreement to execute a bill of sale on the happening of a particular contingency, is clearly a bill of sale within the wider definition of the Bills of Sale Act, 1882. To apply a test I suggested in the course of the argument, assume that before the two months expired it came to the knowledge of the plaintiffs that Mrs. Jones was secretly disposing of her furniture, and putting the money in her pocket, could they not have come to the Court and claimed protection, and obtained relief by an injunction and the appointment of a receiver? In my opinion they could, and that view is borne out by the case of *Taylor* v. *Eckersley* (1), and they would have been entitled to that relief because the bill of sale conferred upon them a right in equity to a contingent charge on the chattels. If I am right that disposes of the case, because it is conceded that if this agreement be a bill of a sale within the meaning of the Bills of Sale Act, 1882, it is bad, and no relief can be claimed in respect of it, and it is therefore unnecessary for me to consider the point whether in any circumstances it is within the power of the Court to order specific performance of an agreement to give a bill of sale. The result is that the plaintiffs' action fails, and must be dismissed with costs.

Solicitors: *Peacock & Goddard, for Trevanion, Curtis & Ridley, Bournemouth; Corbould-Ellis, Mitchell & Mawby.*

(1) (1876) 2 Ch. D. 302.

J. B. B. M.

CRADDOCK BROTHERS, LIMITED *v.* HUNT.

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1922

July 5, 6, 20.

[1921. C. 5074.]

Vendor and Purchaser—Specific Performance—Particulars of Sale—Parcels—Common Mistake—Mistake in antecedent written Agreement embodied in Conveyance—Admissibility of parol Evidence to vary—Rectification of Conveyance—Legal Estate with Notice—Trustee of legal Estate—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 7.

Where, owing to a common mistake in reducing a verbal agreement for the sale of land into writing, the written agreement failed to express the real bargain between the parties, and the mistake was embodied in the deed of conveyance, the Court, since the Judicature Act, 1873, has jurisdiction to rectify the mistake contained in the deed of conveyance, although the deed conformed strictly with the antecedent written agreement and although the effect of ordering rectification is to grant specific performance of a written agreement with a parol variation.

Olley v. *Fisher* (1886) 34 Ch. D. 367 followed in preference to *May* v. *Platt* [1900] 1 Ch. 616.

Observations of Neville J. in *Thompson* v. *Hickman* [1907] 1 Ch. 550, 561, 562 approved.

WITNESS ACTION.

The action related to the ownership of a piece of land, part of a yard adjoining a house. The plaintiffs alleged that the piece in question had been conveyed by common mistake to the defendant and claimed a declaration that the defendant was a trustee thereof and might be ordered to convey the same to the plaintiffs. The case involved the question whether the Court had power to rectify a deed of conveyance which embodied a mistake which was proved by parol evidence to have been made in reducing an antecedent verbal agreement into writing, notwithstanding that the deed conformed strictly with the antecedent written agreement, and whether the Court had jurisdiction by ordering rectification to grant, in effect, specific performance of the contract as rectified.

By an indenture, dated March 20, 1877, a plot of land on the south side of Powlett Street, Wolverhampton, was conveyed to one Rollings in fee simple. This plot (hereinafter referred to as plot 1) consisted of a rectangular strip of vacant land containing, according to the conveyance, 432 superficial

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square yards and being 24 feet in width and 160 feet in length. On the front portion of this plot Rollings erected a dwelling house with suitable outbuildings for his own occupation. By an indenture, dated December 23, 1885, another plot of land also on the south side of Powlett Street and on the west side of and immediately adjoining plot 1 was conveyed to Rollings. This plot (hereinafter referred to as plot 2) consisted of a rectangular strip of vacant land containing, according to the conveyance, 332 superficial square yards and being 18 feet in width and of about the same length as plot 1. Rollings used plot 2 together with so much of plot 1 as did not form the site of his dwelling house and outbuildings as a yard in connection with his business of a builder. In or about the year 1905 he fenced off the site of his dwelling house and outbuildings, consisting, as already stated, of the front portion of plot 1, from the site of his yard, consisting, as already stated, of the whole of plot 2 and the rear portion of plot 1; and from the evidence adduced at the trial, the Court drew the inference that he, at the same time, provided two gates leading from the site of his dwelling house and outbuildings into his yard, one of which opened to the west into plot 2, and the other opened to the south into the rear portion of plot 1. The site of the dwelling house and outbuildings so fenced off contained 267 superficial square yards and was 24 feet in width and 100 feet in length. The site of the yard according to the measurements given in the title deeds contained 497 superficial square yards. A few years after Rollings had fenced off the site of his dwelling house from the yard, he removed to premises elsewhere, and thereupon he permanently blocked up the two gates opening into the yard and let the yard to a glass and lead merchant named George Greenstone at a rent of 6*s*. a week. The dwelling house, which had become known as Powlett House, No. 44 Powlett Street, appears to have remained vacant for some time, but was subsequently let to various tenants.

In 1913 Rollings died, leaving his daughter Kate Catherine Hinckes and her husband John Hinckes his legal personal representatives. After his death Powlett House and the

yard continued to be occupied separately, George Greenstone remaining the tenant of the yard. George Greenstone died in June, 1916, and thereupon his son Maurice J. Greenstone became tenant of the yard, which by that time had become known as "Greenstone's Yard," at the same rent of 6*s*. a week.

In July, 1920, Rollings' representatives determined to sell both Powlett House, which had then been vacant for some time, and Greenstone's Yard, and instructed a firm of auctioneers at Wolverhampton named Boswell & Tomlins to offer both properties for sale by auction in one lot. Mr. Boswell thereupon inspected the properties and drew up particulars and posters advertising the sale for the evening of July 27, 1920. In the particulars the properties were described as Powlett House, No. 44 Powlett Street, together with large yard adjoining. After describing the house, the particulars stated that vacant possession of Powlett House would be given upon completion and that the yard was at present let to Mr. Greenstone. The particulars also stated that "the yard immediately adjoined Powlett House at the side and rear." On the morning of July 27, 1920, Messrs. Boswell & Tomlins received a letter from John Hinckes, one of the vendors, in the following terms: "Dear Sirs, With reference to the sale of Powlett House and yard this evening, I do not know whether you have been informed that the yard is still at the old 1914 rental of 6*s*. per week and subject to the increases of rates since and also to present allowed increase just passed. If the reserve price is not reached I think they had better be offered separately. House (reserve 700*l*.) and yard 200*l*. I trust you will be very successful. Yours faithfully, J. Hinckes." Two or three days before the auction one Percy John Thomas and the defendant inspected Powlett House, and it was arranged between them that, if the house should be offered separately from Greenstone's Yard, Thomas should try to purchase it on the defendant's behalf for 500*l*. The plaintiffs had their business premises on the north side of Powlett Street immediately opposite to the properties in question and knew Greenstone's

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Yard well. They were desirous of buying Greenstone's Yard, and on the day of the sale instructed Messrs. Boswell & Tomlins to bid for it at the auction up to 230*l*. Thomas attended at the auction, which was held as advertised on the evening of July 27, 1920. Powlett House and Greenstone's Yard were put up in the first instance in one lot, but were not sold. Thereupon Powlett House was put up separately, but was not sold. Then Greenstone's Yard was put up, and in the presence of Thomas and with his knowledge was knocked down to the plaintiffs for 230*l*. On the following day the defendant verbally agreed with the vendors acting through their solicitor, Mr. Stirk, to purchase Powlett House for 500*l*.

Having heard the evidence the Court found as a fact that there was no sort of misapprehension in the minds of any of the parties immediately concerned, that is to say, the vendors, the auctioneers, Thomas, the defendant and the plaintiffs, as to what property was sold to and purchased by the plaintiffs or as to what property was sold to and purchased by Thomas on behalf of the defendant: that, as to the vendors themselves, the letter of July 27, 1920, showed clearly that when speaking of the yard they were referring to the whole yard as occupied by Greenstone, and that in speaking of the house they were referring to the dwelling house with the outbuildings known as Powlett House, No. 44 Powlett Street, which was then vacant; that as to Messrs. Boswell & Tomlins, the particulars which they drew up showed conclusively that in offering the yard for sale they intended to offer the whole yard as occupied by Greenstone which, as stated in the particulars, adjoined Powlett House, both at the side and in the rear, and that in offering Powlett House for sale they intended to offer only the vacant house and outbuildings known by that name and did not intend to include any part of the site of Greenstone's Yard. As regards Thomas and the defendant the Court found as a fact, first, that they intended to buy Powlett House and nothing else and, particularly, that they had no intention of buying any part of Greenstone's Yard, and, secondly, that before they made any offer for Powlett

House they knew the extent of its site and also that Greenstone's Yard adjoined it not only at the side but also in the rear and that Greenstone's Yard had been bought by the plaintiffs. As regards the plaintiffs the Court found that they intended to buy the whole of Greenstone's Yard as then occupied by Maurice Joseph Greenstone.

The blunder which led to the litigation arose in the following manner: Shortly before the sale Mrs. Hinckes, one of the vendors, brought the title deeds of the property to Mr. Stirk to enable him to prepare the conditions of sale. These title deeds were contained in two separate envelopes or wrappers, one containing the title deeds relating to plot 1 and the other the title deeds relating to plot 2. Mr. Stirk, who was wholly unacquainted with the property, asked Mrs. Hinckes upon which plot the house had been erected. Mrs. Hinckes answered that it had been erected on plot 1, whereupon Mr. Stirk for his own guidance wrote the word "House" on the envelope containing the deeds relating to plot 1, and the word "Yard" on the envelope containing the deeds relating to plot 2. Mr. Stirk, who was not told by his clients and did not know that Rollings had divided plot 1 and thrown part of it into the yard, jumped to the erroneous conclusion that the whole of plot 1 was occupied with and as part of Powlett House and that Greenstone's Yard was confined to plot 2, and he remained in that mistaken belief, until he was enlightened as to the true facts by the plaintiffs in the following year. On the day after the auction Mr. Stirk prepared two contracts, one relating to the sale of Greenstone's Yard and the other relating to the sale of Powlett House. In drawing up the contract relating to the sale to the plaintiffs of Greenstone's Yard Mr. Stirk took the description and superficial measurement of the property from the parcels contained in the conveyance of December 23, 1885, and made that deed the sole root of title; and in drawing up the contract relating to the sale to the defendant of Powlett House Mr. Stirk took the description and superficial measurement of the property from the parcels contained in the conveyance of March 20, 1877. The parcels inserted in

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the contract relating to Greenstone's Yard were as follows: "All that plot of land situate in Powlett Street Wolverhampton aforesaid to which it has a frontage of six yards and containing in the whole 332 square yards or thereabouts and also such erections thereon as belong to the vendors, which premises are now in the occupation of Mr. Greenstone," and the parcels inserted in the contract relating to Powlett House were as follows: "All that plot of land situate in Powlett Street, Wolverhampton, having a frontage to the said street of eight yards and containing in the whole 432 square yards, And also all that messuage and outbuildings now standing and being on the said land and known as No. 44 Powlett Street aforesaid which said messuage is now vacant." The contracts were respectively indorsed on the outside as follows: "Agreement for sale and purchase of a Yard situate in Powlett Street Wolverhampton," and "Agreement for sale and purchase of land messuage and premises known as No. 44 Powlett Street Wolverhampton." On July 28, 1920, Mr. Stirk sent the engrossment of the contract relating to Greenstone's Yard to the plaintiffs, and on July 29, 1920, Mr. George Craddock signed that engrossment on behalf of the plaintiffs and returned it to Mr. Stirk together with a cheque for 23*l.* as a deposit. Mr. George Craddock did not know the superficial measurement of Greenstone's Yard and paid no attention to the fact that the property was stated in the contract to contain 332 square yards. Mr. Stirk signed the contract on behalf of the vendors. When returning the contract Mr. George Craddock informed Mr. Stirk that Messrs. Fowler, Langley & Wright were his solicitors and would carry out the transaction on his behalf. Messrs. Fowler, Langley & Wright subsequently received a copy of the contract from Mr. Stirk and wrote to the plaintiffs asking for instructions. The plaintiffs thereupon instructed Messrs. Fowler, Langley & Wright to act for them in the matter of the purchase. Messrs. Fowler, Langley & Wright did not know the property and assumed from the contract signed by their clients and from the abstract of title which was subsequently sent to them that Greenstone's

Yard consisted only of plot 2 and carried out the purchase on behalf of the plaintiffs on that erroneous assumption. In preparing the conveyance Messrs. Fowler, Langley & Wright's conveyancing clerk copied out the parcels from the conveyance of December 23, 1885, which parcels referred to a plan of plot 2 drawn on an earlier title deed. Mr. Stirk believing this description of the yard to be accurate, on September 2, 1920, procured the vendors' execution of the conveyance as drawn by Messrs. Fowler, Langley & Wright. The plaintiffs did not execute the conveyance and in fact never saw it until after the present dispute had arisen. In the result the plaintiffs did not acquire any title to that portion of Greenstone's Yard which formed part of plot 1. Mr. Stirk on July 28, 1920, sent the engrossment of the contract relating to Powlett House to Messrs. Hayward & Co. who, not knowing the property, erroneously assumed that it was correctly described and on that assumption signed the engrossment and returned it to Mr. Stirk who signed it on behalf of the vendors. In preparing the conveyance to the defendant Mr. Hayward copied the parcels from the conveyance of March 20, 1877, and referred to the plan on that conveyance which delineated the whole of plot 1. Mr. Stirk believing this description of Powlett House to be accurate, on September 3, 1920, procured the vendors to execute the conveyance as drawn by Mr. Hayward. The defendant did not execute the conveyance and never saw either the contract or the conveyance until after the question now in dispute had arisen. In the result the defendant acquired a title, not only to Powlett House, but also to that portion of Greenstone's Yard which formed part of plot 1. Neither of the vendors were called as witnesses, but from the evidence given by their solicitor and from the deed which they subsequently executed as hereinafter mentioned the Court drew the inference that they did not know the superficial measurement of either of the properties and that in executing both the conveyance to the plaintiffs and the conveyance to the defendant they were under the mistaken belief that those conveyances were properly drawn to carry

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out the sale of Greenstone's Yard to the plaintiffs and the sale of Powlett House to the defendant.

On the completion of the sale of Greenstone's Yard the plaintiffs, in accordance with the completion account rendered to their solicitors by Mr. Stirk, paid to the vendors the apportioned part of the rent of 6*s.* per week (being as before stated the rent payable by Maurice J. Greenstone for the whole of the yard) as from the last quarter day down to the date of completion. Immediately after the completion of the sale the defendant entered into possession of Powlett House and took up his residence there. Being in complete ignorance of the fact that a part of Greenstone's Yard had been conveyed to him, the defendant never thought of making any claim to any portion of that yard or to any portion of the rent payable by Greenstone.

The plaintiffs having bought the yard for the purpose of their business gave Maurice J. Greenstone notice to quit at Christmas, 1920. They received the two quarters' rent due at Michaelmas and at Christmas respectively and on the expiration of the notice to quit they took possession of the yard. In the spring of 1921 the plaintiffs instructed their architect to get out plans for the erection of a repair shop with lavatory accommodation extending over the whole width of the back portion of the yard. The architect having occasion to consult the plans on the plaintiffs' title deeds, discovered that these deeds showed no title in the plaintiffs to that part of the yard which was situate immediately behind Powlett House, and thus it was that in April, 1921, the plaintiffs for the first time discovered the blunder which had been made in carrying out their purchase. The plaintiffs thereupon informed the vendors and the defendant of the blunder and requested them to rectify it by conveying to the plaintiffs that part of Greenstone's Yard which had been omitted from their conveyance and included in the defendant's conveyance by mistake. The vendors having parted with all their interest in the property were powerless to help the plaintiffs, and the defendant not only refused to execute the deed of conveyance which the plaintiffs

prepared for the purpose of rectifying the mistake, but, having realized that a portion of Greenstone's Yard had been conveyed to him, attempted to deprive the plaintiffs of their possession of the part of the yard which was included in the defendant's conveyance. Accordingly, this action was commenced for the purpose of obtaining the declaration and relief above stated.

The case was first argued as a question of the construction of the plaintiffs' antecedent written agreement of July 29, 1920, a question which is only incidental to the main object of this report. The plaintiffs contended that that agreement comprised the whole of Greenstone's Yard and relied on *Leuty* v. *Hillas* (1): and the Court was of opinion that in the particular circumstances the reference in the description of the parcels to the situation of the property, its frontage to Powlett Street and its occupation by Greenstone, ought to be treated as forming the leading description of the parcels and that the inaccurate statement as to the superficial area might be rejected as falsa demonstratio, and decided, though not without hesitation, that on the true construction of the agreement the whole of the yard, including the piece of the yard in dispute, was comprised in the agreement and that, assuming that view of the construction of the agreement to be correct, the case was covered by *Leuty* v. *Hillas* (1), as the defendant took his conveyance with notice of the plaintiff's title, knowing before he purchased Powlett House that the piece of land in dispute formed part of Greenstone's Yard and knew or had notice that it had been sold to the plaintiffs before he bought Powlett House.

Jenkins K.C. and *F. K. Archer* for the plaintiffs. First, upon the true construction of the agreement with the plaintiffs, the whole of the yard was agreed to be sold to them: and the defendant having purchased with notice of the plaintiffs, title is a bare trustee of the part in dispute, which was conveyed to him in error, and should be ordered to convey the same to the plaintiffs: *Leuty* v. *Hillas*. (1) But, secondly,

(1) (1858) 2 De G. & J. 110.

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if upon its true construction the agreement carried only the part of the yard at the side of plot 1—i.e., plot 2—and did not include the part in dispute, then the plaintiffs are entitled to rectification of the deed by which the part of the yard in dispute was conveyed to the defendant. The parol evidence shows that there was a common mistake in describing the parcels in the conveyances and antecedent written agreements, and the Court will admit that parol evidence and rectify the written agreements: *Davies* v. *Fitton*. (1) Since the Judicature Act, 1873 (s. 24, sub-s. 7), the Court has jurisdiction to grant specific performance of the agreements so rectified: *Olley* v. *Fisher* (2); *Shrewsbury and Talbot Cab Co.* v. *Shaw* (3); Fry on Specific Performance, 6th ed., p. 381, pl. 818; Williams' Vendor and Purchaser, 2nd ed., p. 790. There can be no real difference now whether the remedy sought is a common law or equitable remedy. The decision in *May* v. *Platt* (4) (in which *Olley* v. *Fisher* (2) was not cited) is unsound and ought not to be followed. Neville J. in *Thompson* v. *Hickman* (5) followed *May* v. *Platt* (4) with reluctance, and adversely criticised the reasoning of Farwell J. in that case, and of Lord Eldon in *Marquis Townshend* v. *Stangroom*. (6) *Woollam* v. *Hearn* (7) and *Johnson* v. *Bragge* (8) were cases not concerned with common mistake and rectification, but turned on the Statute of Frauds, and the decisions in those cases were grounded on the principle that the Court will be careful not to encroach on that statute.

Ward Coldridge K.C. and *Mossop* for the defendant. On its true construction the plaintiffs' agreement dealt only with the part of the yard at the side—i.e., plot 2. The superficial area of 332 square yards, as stated in the agreement, was correct if the agreement related only to the part of the yard composing plot 2: whereas, if it included the whole yard, the area should have been stated as 497 square yards. The governing part of the description is the area stated. Apart from construction

(1) (1842) 2 D. & War. 225.
(2) 34 Ch. D. 367.
(3) (1890) 89 L. T. J. 274.
(4) [1900] 1 Ch. 616.
(5) [1907] 1 Ch. 550, 561, 562.
(6) (1801) 6 Ves. 328.
(7) (1802) 7 Ves. 211*b*; White & Tudor's L. C., 8th ed., vol. ii., 517.
(8) [1901] 1 Ch. 28.

and even assuming common mistake, the Court has no power to rectify the mistake; as the antecedent written agreement did not contain the piece of the yard in question the Court cannot rectify the conveyance which followed strictly the antecedent written agreement: *May* v. *Platt.* (1) That case has stood undisputed for twenty years: true, it was criticised by Neville J. in *Thompson* v. *Hickman* (2), but yet it was followed by him. Eve J. in *Forgione* v. *Lewis* (3) in rectifying a clerical error did not depart from *May* v. *Platt.* (1) In *Olley* v. *Fisher* (4) there was a compromise and the observations of North J. were unnecessary. The right to rectification has to be established before the plaintiffs can succeed, and this is the first case that has come before the Court for its decision in the absence of the vendors. *Leuty* v. *Hillas* (5) was a different case; there the mistake was in the conveyance, the contract was correct to the knowledge of both parties.

Jenkins K.C. in reply. *Leuty* v. *Hillas* (5) is only relied on for the purpose of indicating the form the remedy by way of specific performance is to take in the absence of the vendors.

Cur. adv. vult.

July 20. P. O. LAWRENCE J. after stating that the action had been brought with the object of rectifying a serious blunder which had been made in drawing up certain agreements and conveyances in connection with the sale of two plots of land in Powlett Street, Wolverhampton, formerly belonging to Benjamin Davis Rollings, and after stating the facts as above set out proceeded as follows: The contention of the defendant is that the Court is powerless to rectify the blunder, because the antecedent agreement relating to Greenstone's Yard did not include the piece of land in dispute and, according to the authorities and particularly according to the decision of Farwell J. in *May* v. *Platt* (1), the Court cannot rectify a mistake contained in a conveyance, if the conveyance

(1) [1900] 1 Ch. 616.
(2) [1907] 1 Ch. 550, 561, 562.
(3) [1920] 2 Ch. 326.
(4) 34 Ch. D. 367.
(5) 2 De G. & J. 110.

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has been made in pursuance of and in strict accordance with an antecedent written agreement, although that agreement has, owing to a common mistake, failed to express the true bargain made by the parties. The basis of this contention is that, by ordering such a rectification, the Court would, in effect, be granting specific performance of a written agreement with a parol variation, which it has no power to do. The plaintiffs on the other hand contend, in the first place, that the antecedent agreement relating to Greenstone's Yard did include the piece of land in dispute and that the defendant, in the circumstances of this case, became a bare trustee for the plaintiffs of the legal estate of that piece of land and is therefore bound at the plaintiffs' request to convey such legal estate to the plaintiffs and, in the second place, that even if the antecedent agreement relating to Greenstone's Yard did not include the piece of land in dispute the Court has ample jurisdiction to rectify the plaintiffs' conveyance.

The plaintiffs in support of their first contention rely upon *Leuty* v. *Hillas*. (1) [His Lordship then dealt with the question of the construction of the plaintiffs' agreement of July 29, 1920, and holding the case to be covered by the decision in *Leuty* v. *Hillas* (1), decided that question in the plaintiffs' favour, as stated above, and then proceeded as follows :] Assuming however that the construction I have placed upon the agreement is wrong and that the agreement only comprises plot 2 (for I recognize that the question of construction is by no means free from doubt) I am of opinion that the plaintiffs' second contention ought to prevail and that they are entitled to have their conveyance rectified so as to carry out the true bargain which they made with the vendors.

In *May* v. *Platt* (2) Farwell J. held that the Court cannot rectify a conveyance, when it is made in pursuance of and in accordance with a previous written agreement, as such a rectification would, in effect, be granting specific performance of a written agreement with a verbal variation, which the Court cannot do.

The decision in that case was mainly founded on two cases,

(1) 2 De G. & J. 110. (2) [1900] 1 Ch. 616.

both of which were decided before the Judicature Act, 1873, was passed—namely, *Woollam* v. *Hearn* (1) (which was not a case of rectification) and *Davies* v. *Fitton.* (2) The learned judge's attention does not however seem to have been drawn either to *Olley* v. *Fisher* (3) or to *Shrewsbury and Talbot Cab Co.* v. *Shaw* (4), nor does it appear that the effect of s. 24, sub-s. 7, of the Judicature Act, 1873, was in any way taken into consideration.

In *Olley* v. *Fisher* (3) North J. expressed his clear opinion that, since the Judicature Act, 1873, the Court has jurisdiction to receive parol evidence for the purpose of rectifying a written contract and to grant specific performance on the footing of the contract as rectified.

In *Shrewsbury and Talbot Cab Co.* v. *Shaw* (4) Kay J., following the opinion expressed by North J. in *Olley* v. *Fisher* (3), admitted parol evidence of a common mistake for the purpose of rectifying a written agreement, and having held that the agreement did not carry out the real intention of the parties, decreed specific performance of the agreement as rectified.

In *Thompson* v. *Hickman* (5) (where neither *Olley* v. *Fisher* (3) nor the *Shrewsbury and Talbot Cab Co.* v. *Shaw* (4) were cited and where the Judicature Act, 1873, was not mentioned either by counsel or by the judge) Neville J. considered that he was bound by *Davies* v. *Fitton* (2) and *May* v. *Platt* (6), and held that parol evidence tendered for the purpose of rectifying a conveyance which had been made in conformity with an antecedent written agreement was inadmissible. In doing so, however, the learned judge expressed his inability to follow the reasoning upon which *Davies* v. *Fitton* (2) and *May* v. *Platt* (6) were based and gave cogent reasons why in his opinion that reasoning was unsound.

In the second edition of Fry on Specific Performance the point now under consideration is discussed at length in Part III., ch. XV. (see pp. 346-356), which chapter, as stated

(1) 7 Ves. 211*b*.
(2) 2 D. & War. 225.
(3) 34 Ch. D. 367.
(4) 89 L. T. J. 274.
(5) [1907] 1 Ch. 550, 561, 562.
(6) [1900] 1 Ch. 616.

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in the Preface, was written by the late Sir Edward Fry himself. In dealing with principles apart from decided cases, the learned author states that in his opinion there could be no objection in point of justice to a plaintiff asking to have a common mistake corrected and the real contract carried into execution, and that, as there was an undoubted jurisdiction for the reform of contracts and also a jurisdiction for the execution of them, there seemed no reason why, when both these grounds of action were necessary to give the plaintiff his full rights, they might not be proceeded on in one and the same action: see pl. 781. The learned author then proceeds to consider the cases and, although he comes to the conclusion that the weight of authority before the Judicature Act, 1873, was in favour of the proposition that a plaintiff could not sue for the specific performance of a contract with a parol variation, he makes it plain that he does not agree with that proposition. After having dealt with the cases the learned author considers the effect of s. 24, sub-s. 7, of the Judicature Act, 1873, and submits that under that provision the Court could have no difficulty in entertaining an action for the reformation of a contract and for the specific performance of the reformed contract in every case in which the Statute of Frauds did not create a bar: pl. 799 (see at p. 400 in 5th ed., 1911).

The reference to the Statute of Frauds in this connection must I think mean that there may be cases where the statute would create a bar to the enforcement of the reformed contract, as the learned author has already pointed out that mistake, like fraud, is an exception to the statute in equity (see pl. 782); and therefore so far as the rectification of the contract is concerned the statute can afford no defence.

In this state of the authorities I am of opinion that the weight of authority is in favour of the proposition that since the Judicature Act, 1873, a plaintiff can sue for the specific performance of a contract with a parol variation, and that I am not bound to follow the decision of Farwell J. in *May* v. *Platt*. (1) If I am right in taking this view it follows in my

(1) [1900] 1 Ch. 616.

opinion that there can be no objection to rectifying a deed, although it conforms strictly to an antecedent written agreement, provided the evidence satisfies the Court that there has been a common mistake in reducing the antecedent agreement into writing, which mistake has been embodied in the deed. I entirely concur with the statement made by Neville J. in *Thompson* v. *Hickman* (1) that to grant relief where the error has crept into one document and refuse it where it is embodied in two is inconsistent with equitable principle, for equity regards the substance rather than the form of the transaction.

I only desire to add that, even if the Statute of Frauds (which is not pleaded) had any bearing on the present case (which in my opinion it has not), the fact that the plaintiffs, in part performance of the contract, went into possession of the disputed piece of land would afford a complete answer to any plea founded on the statute.

In the result I have come to the conclusion that the Court has jurisdiction to rectify the plaintiffs' conveyance, whether the antecedent agreement did or did not include the piece of land in dispute, and, having arrived at that conclusion, I have no hesitation, in the circumstances of this case, in exercising such jurisdiction.

In my judgment the proper method of remedying the blunder which has been made in this case is to order the defendant to execute a conveyance to the plaintiffs of so much of plot 1 as forms part of the site of Greenstone's Yard and to sign an acknowledgment of the plaintiffs' right to the production of the title deeds relating to plot 1 together with an undertaking for their safe custody—and I further order that a memorandum of the conveyance to be executed by the defendant be indorsed on the defendant's conveyance of September 3, 1920.

Solicitors: *Rawle, Johnstone & Co., for Fowler, Langley & Wright, Wolverhampton; Wainwright & Co., for E. L. Feibusch, Wolverhampton.*

(1) [1907] 1 Ch. 562.

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SARGANT J.

April 27, 28; *May* 5.

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June 19, 20; *July* 27.

In re CHAPLIN AND STAFFORDSHIRE POTTERIES WATERWORKS CO., LIMITED'S, CONTRACT.

[1922. C. 680.]

Vendor and Purchaser—Executor—Sale of Land—Sale of Surface or Minerals separately—Sanction of Court—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 44, 50—*Trustee Act*, 1893, *Amendment Act*, 1894 (57 *Vict. c.* 10), *s.* 3—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 2, *sub-s.* 2.

Legal personal representatives, in whom under the Land Transfer Act, 1897, the freeholds of a deceased person are vested, have power to sell the surface and minerals of his lands separately without obtaining the sanction of the Court under s. 44 of the Trustee Act, 1893.

So *held* by the Court of Appeal, reversing the decision of Sargant J.

Oceanic Steam Navigation Co. v. *Sutherberry* (1880) 16 Ch. D. 236 discussed and explained.

In re Cavendish and Arnold's Contract [1912] W. N. 83 approved.

Dictum of Russell J. in *In re Wicksted's Trusts* [1921] 2 Ch. 184 not approved.

VENDOR AND PURCHASER SUMMONS.

By a contract dated September 3, 1921, the Honourable Eric Chaplin, the Most Noble Niall Diarmid Duke of Argyll, and the Honourable Sir Arthur Lawley agreed to sell and the Staffordshire Potteries Waterworks Co. to purchase for 1925*l.*, first, a piece of freehold land situate at the Meir Longton in the County of Stafford containing two acres or thereabouts, and, secondly, certain minerals therein described, which lay partly under the land the surface of which was thereby agreed to be sold but to a greater extent under adjacent lands, the surface of which was not comprised in the contract of sale but retained by the vendors. The general conditions and stipulations of the sale of the Trentham estate of the late Duke of Sutherland were incorporated in the contract, and in these it was stated that the vendors were selling as executors of the late Duke.

On September 17, 1921, the purchasers' solicitors delivered requisitions on title and by the first requisition took the objection that the vendors as personal representatives of the late Duke had no power to sell the minerals apart from the surface, except with the sanction of the Court. The vendors denied

this, but the purchasers having refused to withdraw the requisition the vendors took out a summons on February 11, 1922, asking for a declaration that the applicants as executors of the late Duke were entitled to sell the minerals comprised in the above contract apart from the surface of the lands under which such minerals were situate.

It was in evidence that on previous sales of the Trentham estate of the late Duke the vendors had sold the estate in nearly 1000 lots and that in every case the minerals were reserved to the vendors.

The summons came on for hearing before Sargant J. on April 27, 1922.

J. W. F. Beaumont for the vendors. An executor can sell the surface of the land of his testator and the minerals under it separately without obtaining the sanction of the Court under s. 44 of the Trustee Act, 1893, as amended by the Trustee Act, 1893, Amendment Act, 1894. "An executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate": Williams on Executors, 11th ed., p. 693. Therefore before the Land Transfer Act, 1897, an executor could as regards leaseholds forming part of his testator's estate exercise all the powers of an absolute owner, and the only duty cast upon him was to obtain the best price possible. By s. 2, sub-s. 2, of the Land Transfer Act, 1897, the powers of personal representatives in respect of personal estate apply to real estate as if it were a chattel real vesting in them. Sect. 44 of the Trustee Act, 1893, is an enabling section superseding the Confirmation of Sales Act, 1862 (25 & 26 Vict. c. 108), s. 2, which was rendered necessary by *Buckley* v. *Howell* (1), where it was decided that a trustee could not sell minerals and surface separately under a power of sale. The ratio decidendi was that it was an injustice as between tenant for life and remainderman to sell surface and retain the minerals or vice versa. There is nothing in the section to prevent an executor selling without the leave of the Court, if he has

(1) (1861) 29 Beav. 546.

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that power apart from it. *In re Cavendish and Arnold's Contract* (1) decides that a legal personal representative has the power; and although the attention of Neville J. was not called to s. 50 of the Trustee Act, 1893 : see *In re Wicksted's Trusts* (2), that only affects his decision that a legal personal representative could not apply for leave to sell under s. 44 of the Act. That was incorrect and was decided to the contrary by Russell J. in *In re Wicksted's Trusts.* (2) The further statement by Russell J. that the legal personal representative must apply for leave to sell surface and minerals separately is dictum and is, it is submitted, incorrect.

C. J. W. Farwell for the purchasers. An executor selling property, whether freehold or leasehold, for the purposes of the administration of his testator's estate is selling as a trustee. The Land Transfer Act, 1897, s. 2, sub-s. 1, provides that legal personal representatives are to hold real estate subject to the powers, rights, duties and liabilities in the Act mentioned "as trustees for the persons by law beneficially entitled thereto." These powers include an overriding power of sale and a beneficiary cannot object to any exercise of it for the benefit of the estate. They could not sell under unduly depreciatory conditions or at other than the proper value ; but they are as towards the purchaser in the position of absolute owners, and he cannot inquire whether the power is being properly exercised. The power of dealing with the assets does not, however, extend "to enable an executor to grant an underlease of a term of years unless it is the best means of administering the estate" or "to give an option of purchase in future" : Brickdale and Sheldon's Land Transfer Acts, 2nd ed., pp. 267, 268. This is because he is a trustee and as such he comes within s. 44 of the Trustee Act, 1893. Sect. 44, sub-s. 2, does not limit the generality of sub-s. 1, and in any case a legal personal representative is a trustee under "an instrument creating the trust" within sub-s. 2—namely, the will or letters of administration coupled with the Land Transfer Act, 1897.

(1) [1912] W. N. 83 ; 56 Sol. J. 468.

(2) [1921] 2 Ch. 184, 186n.

[SARGANT J. referred to *Oceanic Steam Navigation Co.* v. *Sutherberry*. (1)]

That is the authority that an administrator cannot give an option to purchase in future. There Jessel M.R. said that an administrator is considered in a Court of equity as a trustee. That being so, he like any other trustee can only sell the surface of land and the minerals separately by leave of the Court: *In re Wicksted's Trusts*. (2)

Beaumont in reply. An executor is only a trustee to the extent that he is dealing with assets that are not his own, but he has complete and absolute control over the property and nothing that he does can be disputed except on the ground of fraud: *Earl Vane* v. *Rigden*. (3) He is not qua executor a trustee: *In re Blow*. (4) The real question is whether an executor's power of sale stands on the same footing as a trustee's power of sale. In the case of a trustee the language of the power falls to be construed, but the only limitation on an executor's power of sale is the object for which it is conferred—namely, to pay debts. On principle there is no reason why he should not sell in whatever manner he pleases, provided he obtains the best price, and *In re Cavendish and Arnold's Contract* (5) is an authority that he can sell the surface and minerals separately.

Cur. adv. vult.

May 5. SARGANT J. delivered the following written judgment:—

This summons raises in the simplest and neatest form the important general question whether executors, in whom under the Land Transfer Act, 1897, freeholds of a testator are vested, have power to sell the minerals apart from the surface.

The only reported or partly reported cases dealing with the question are, first, one before Neville J. in the year 1912, which tends in favour of the power: *In re Cavendish and Arnold's Contract* (5); and, secondly, one before Russell J.

(1) 16 Ch. D. 236.
(2) [1921] 2 Ch. 184.
(3) (1870) L. R. 5 Ch. 663, 668.
(4) [1914] 1 Ch. 233, 246.
(5) [1912] W. N. 83; 56 Sol. J. 468.

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in the course of last year: *In re Wicksted's Trusts* (1), which is in the opposite direction. But for the reasons I am about to state neither decision, even if it stood alone, would be binding on me to the full extent of what I have now to decide. And, as it is, the conflict of views renders it additionally necessary to consider the question, or some aspects of it, afresh.

The decision of Neville J. (2) is reported only quite shortly in the Weekly Notes and the Solicitors' Journal; and in any case, therefore, is not of anything like the same authority as if it had appeared in any of the regular reports. But, further, it appears that during the argument of the case the learned judge's attention was not called to the provisions of s. 50 of the Trustee Act, 1893; and, also, that when his attention was afterwards called to this omission he requested that the case should not be further reported, since, apart from this omission, he would have decided the case on grounds different from those appearing in the report. On the other hand, though Russell J. in the case before him expressed the view that legal personal representatives had no power to sell minerals apart from the surface without the leave of the Court, this was not absolutely necessary for the purposes of his decision, which was that it was competent for them to obtain leave from the Court for that purpose under s. 44 of the Trustee Act, 1893, as amended by s. 3 of the Trustee Act, 1893, Amendment Act, 1894.

That the actual decision of Russell J. was right I have no doubt, though Mr. John Beaumont for the vendors made some criticisms on it. It is in my judgment clear that the definition of a trustee in the Trustee Act, 1893, is amply sufficient to include a legal personal representative; and the exception of cases where the instrument of trust contains a provision to the contrary does not involve the hypothesis or assumption, that the legislation is dealing only with cases where there is an actual instrument, in which it should be possible to seek for provisions to the contrary. While, further, were it necessary that there should be such an instrument, the probate or letters of administration under

(1) [1921] 2 Ch. 184. (2) [1912] W. N. 83; 56 Sol. J. 468.

which the legal personal representatives act would seem to satisfy the description sufficiently. And this being so, a legal personal representative in respect of the real estate vested in him by virtue of s. 1 of the Land Transfer Act, 1897, is placed, so far as necessary, in as good a position as any other trustee for sale of land, that is to say, he may by applying to the Court obtain authority to sell the surface apart from the minerals and vice versa.

But the question still remains whether a legal personal representative has any need to resort to the enabling powers in respect of s. 44 of the Trustee Act, 1893; or whether he can, altogether apart from the section, sell the surface or the minerals separately. Mr. Beaumont has strenuously contended that he can, on the ground that the powers of a legal personal representative with respect to the subject matter vested in him were always such as to enable him to deal with third parties as fully and unrestrainedly as an absolute beneficial owner might do; that he could, therefore, altogether independently of any statute, such as 25 & 26 Vict. c. 108, or s. 44 of the Trustee Act, 1893, realize leaseholds by selling the surface and minerals separately; and that he is now entitled under the Land Transfer Act, 1897, to deal with freeholds in the same unrestricted manner. He further contended that the conclusion to this effect of Neville J. as stated in the report in the Weekly Notes (1), was altogether independent of s. 50 of the Trustee Act, 1893, and ought still to be taken as an authority in favour of the power.

This last contention is inadmissible. A report in the Weekly Notes or the corresponding publication, the Solicitors' Journal, is not ordinarily an authority which the Court can accept, except perhaps on questions of practice—certainly not on an important question of general law such as the present. And, further, in this particular case the learned judge himself recognized that the case ought not to stand as an authority on the grounds on which he had decided it. This obviously applies to all the grounds of the decision and not merely to some of them. Nor is it altogether certain that the view of

(1) [1912] W. N. 83.

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the learned judge, as to the antecedent existence of a power to deal with leaseholds in this way, must necessarily have been unaffected by his view as to whether such a power with certain qualifications was given by s. 44 of the Act of 1893. In my judgment, the contention that the legal personal representative had an antecedent power to dispose of leasehold land in this way must succeed, if at all, on considerations independent of the report of *In re Cavendish and Arnold's Contract.* (1)

Now as to this not only has no authority been cited to me to prove that the legal personal representative had the same power as towards purchasers of disposing of chattels real as an absolute beneficial owner would have had, but there is high authority to the contrary. No great importance need perhaps be attached to the absence of any case specifically deciding that a legal personal representative can dispose of the surface of leasehold lands apart from the minerals, since in general a lessee of land would have no power to commit waste by getting the subjacent minerals, and would not, therefore, be able to create by means of such severance an interest in the minerals which was of any commercial value. But that a legal personal representative in dealing with chattels real is in a position entirely different from a beneficial owner, and is subject in general to much the same restrictions as a trustee for sale, is clearly established by the case of *Oceanic Steam Navigation Co.* v. *Sutherberry.* (2) That case, which was one of considerable practical hardship to the purchaser, and is therefore the stronger as an authority, decided that the legal personal representative could not grant a sub-lease of leaseholds with an option of purchase to the sub-lessee.

In the course of his judgment Sir George Jessel said: "An administrator is considered in a Court of equity as a trustee, and his primary duty is to sell the intestate's estate for the payment of his debts. It is quite true that, having the legal estate in the leaseholds, he may in some cases underlet them, and the underlease will be supported in equity as well as in law. But that is an exceptional mode of dealing with the assets,

(1) [1912] W. N. 83. (2) 16 Ch. D. 236, 243, 244.

and those who accept a title in that way must take it subject to the question whether it was the best way of administering the assets." And later on, after referring to an administrator as "a mere trustee whose duty it was to sell within a reasonable time," he says: "In the case of an ordinary trustee it is clear that no such option could be given by him; and although an administrator is not an ordinary trustee, still he is in a similar position, and to support what has been done in the present case would, in my opinion, be not only a great extension, but an unauthorised and unwarranted extension, of the powers hitherto understood to be reposed in an administrator." And James L.J. puts it in this way: "For the purposes of this case I can see no difference between an executor or administrator and any other trustee. The only distinction that I am aware of is this, that the law does not expect an executor or administrator to give evidence to a purchaser, or enable a purchaser to require evidence from him, that what he is doing is necessary for the due execution of his trust. With that difference he is exactly in the position of a trustee."

Those are valuable general statements of the powers of legal personal representatives with regard to leaseholds, and amount to this, that, though as regards the occasion or necessity for selling a legal personal representative stood in a particularly strong position, yet as regards the method of realization he was in the same position as any other trustee. If the legal personal representative sold out and out, any purchaser would get a perfectly good title, even if it should afterwards appear that the sale was unnecessary or improper. But if he adopted any peculiar or unusual mode of realization, the purchaser would obtain no better title than if he had taken from any other trustee for sale.

Now it is clear that to split land into layers and sell some or one of these layers separately, as when surface only or minerals only are sold, is to deal with land by a method which is peculiar or unusual, and has been expressly recognized as outside the power or discretion of ordinary trustees for sale. And it follows, therefore, in my judgment, that legal personal

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representatives were under a similar disability with regard to leaseholds. And, of course, the Land Transfer Act, 1897, does not put them in any better position as to freeholds, apart from the sanction of the Court, than they were previously in with regard to leaseholds.

Whether such a sale would necessarily be bad, or would be capable of being supported by the purchaser on proving affirmatively that it was the most beneficial method of sale, need not be considered for the present purpose. In the latter case, as well as the former, the title is not one that a purchaser could be called on to accept. Nor have I to consider whether the special position of the purchasing company or the previous dealing with the surface or certain of the minerals might enable a title to be made to all or some part of the minerals in question. The facts stated are not sufficient for this purpose, and the general question is all that has been raised or argued.

I propose to answer the question raised in the negative.

H. C. G.

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The vendors appealed. The appeal was heard on June 19 and 20, 1922.

Maugham K.C. and *J. W. F. Beaumont* for the appellants. If Sargant J.'s decision be held to be correct many titles will be affected. The estate here has been sold in plots reserving the minerals. That is the normal and only reasonable way of dealing with the property. The point in this case first arose in 1860 with the decision in *Buckley* v. *Howell* (1), which threw a doubt on the power of trustees to sell land with a reservation of the minerals. It was there held that a power of sale and exchange did not authorize trustees to sell lands with a reservation of the minerals. In consequence of that decision the Confirmation of Sales Act, 1862 (25 & 26 Vict. c. 108), was passed, which, by s. 2, required the sanction of the Court to be obtained to such a sale. *Buckley* v. *Howell* (1) is criticised in Dart on Vendors and Purchasers, 4th ed., vol. ii.,

(1) 29 Beav. 546.

p. 1071. By s. 17, sub-s. 1, of the Settled Land Act, 1882, trustees for the purposes of the Act were relieved from the necessity of applying to the Court for its sanction of a sale of land apart from the minerals. Sect. 2 of the Confirmation of Sales Act, 1862, was repealed by the Trustee Act, 1893, and replaced by s. 44 of that Act. By s. 50 of the latter Act the expression "trust" does not include the duties incident to an estate conveyed by way of mortgage; but with this exception the expressions "trust" and "trustee" include implied and constructive trusts, and cases where the trustee has a beneficial interest in trust property, and the duties incident to the office of personal representative of a deceased person.

It is not contended that a personal representative cannot apply to the Court for its sanction to a sale, but it is submitted that he is not bound to do so. By the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), the Legislature by s. 4, sub-s. 1 (ii.), authorized mortgagees to sell the mortgaged property, or any part thereof, or any mines and minerals apart from the surface, thereby showing that it considered that this was necessary where it was desired to realize the property advantageously.

In this state of the law *In re Cavendish and Arnold's Contract* (1) was decided, in which Neville J. held that an executor was not within the words "trustee or other person" in s. 44 of the Trustee Act, 1893, as amended by s. 3 of the Trustee Act, 1894.

By s. 2, sub-s. 2, of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), "All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting

(1) [1912] W. N. 83.

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in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate."

Under that sub-section a legal personal representative has as complete a power of sale over the real estate as he has over the chattels real, subject to the proviso, in the case of real estate, that he cannot sell without the concurrence of the other personal representatives and that he must obtain the sanction of the Court to such a sale.

In *In re Wicksted's Trusts* (1) Russell J. held that the executor must come to the Court to obtain its sanction to a sale of the surface apart from the minerals. The petition there was presented by a sole executor and was not contested.

Oceanic Steam Navigation Co. v. *Sutherberry* (2) was relied upon by Sargant J., but it is submitted it does not touch the present case so far as the decision goes.

[YOUNGER L.J. The essential decision in that case was that to give a person an option of purchase was not to exercise a power of sale.]

In *Keating* v. *Keating* (3) it was held that a lessee taking a reversionary lease from an executor, with full notice, was bound to show that such lease was properly granted by the executor in the due administration of his office.

[YOUNGER L.J. To grant an underlease of leasehold property is in no sense the exercise of a power of sale.]

The real question in this case is whether the executor is precluded from selling in a manner which is most beneficial for his testator's estate. A sale of the surface apart from the minerals is the normal way of selling property of the character dealt with in this case, and trustees would be committing a devastavit if they sold in any other way.

The rights of personal representatives extend beyond those of trustees: see F. E. Farrer's articles in the Solicitor's Journal for May 27 and June 3, 1922.

It is abundantly clear that originally the executor was the true representative of his testator. It was thought necessary

(1) [1921] 2 Ch. 184. (2) 16 Ch. D. 236.
(3) (1835) Ll. & G. temp. Sug. 133.

to give trustees a power to sell property in lots. No one at that time thought that executors had not that power. There is no reason for saying that an executor has not the same powers as his testator. Sect. 44 of the Trustee Act, 1893, is an enabling section and does not cut down existing rights. It does not restrict the powers already possessed by a personal representative. The object of s. 13 was to extend the power of trustees. It is not suggested that executors could not before that have sold in lots.

Some of the rights conferred by the Trustee Act apply only to ordinary trustees, and are not intended to apply to personal representatives. For example s. 20 empowers trustees to give receipts. The executor always had such a power at common law.

It is submitted, therefore, that an executor has the same powers of sale as his testator had.

[SCRUTTON L.J. referred to *In re Yates.* (1)]

That was the case of a mortgagee. Mortgagee cases may be misleading, because there the intention is that the mortgagor shall get back his property. They do not assist much in cases of trustees and executors.

It is submitted that Sargant J. has taken too narrow a view and that the appeal ought to be allowed.

C. J. W. Farwell for the respondents. The executor is a person who is for the time being authorized to sell by virtue of the Trustee Act, 1893. It is argued that an executor is in the same position as his testator. That is putting it too high. The position of an executor when exercising a power of sale is different from that of a trustee exercising a similar power. The executor when exercising the power is not in the position of an absolute owner. It is admitted that, apart from s. 44 of the Trustee Act, an executor would have power to sell in the way most beneficial for the estate.

[YOUNGER L.J. Has not Sargant J. said the contrary ?]

He relied on *Oceanic Steam Navigation Co.* v. *Sutherberry* (2), as showing that an executor had not all the powers of an absolute owner. The Court must look at s. 44 of the Trustee

(1) (1888) 38 Ch. D. 112. (2) 16 Ch. D. 236.

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Act, 1893, and see whether it bears the meaning which it is submitted it bears, regardless of any inconvenience which may arise from the adoption of that meaning. The Act says that if a purchaser desires the protection of the Court the executor may come to the Court and get it. Sect. 44 gives the executor the right to go to the Court for its sanction, and if he gets it the title of the purchaser will be perfect. The Land Transfer Act, 1897, s. 2, sub-s. 1, uses in terms the word "trustees." The words are "the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto." The word "trustees" is there used as defining the position of the executors as regards real estate.

As to the interests of next of kin in the estate of an intestate see *Cooper* v. *Cooper*. (1)

It is submitted that an administrator or executor is a trustee for the purposes of the Trustee Act, 1893.

The Court has to see whether it is necessary to include in s. 44 an executor or administrator. Sub-s. 2 of the section means that an executor or trustee is not bound to obtain the consent of the Court from time to time, but may obtain a general consent.

There is no authority that, apart from prohibition, an executor is not empowered to sell the property of his testator to the best advantage. Assuming that an instrument in writing is necessary, it is not necessary that there should be an express power in the instrument. The executor is appointed by the will, which is an instrument, and virtute officii he has a power of sale. The will shows who has the power of disposing of the property. It is not necessary to find an express power of sale in the will. The position of an executor is shown by *Farr* v. *Newman*. (2) An executor is not in the position of an absolute owner, though he is in a better position to deal with a purchaser than a trustee with a power of sale, because there is no question whether he has a power of sale by the instrument. It is not necessary that the power should expressly arise under an instrument. It

(1) (1874) L. R. 7 H. L. 53, 64. (2) (1792) 4 T. R. 621, 644.

is sufficient if there is an instrument which puts the executor in a position to deal with the property.

Having regard to the interpretation section (s. 50) of the Trustee Act, 1893, the words "or other person" added to s. 44, sub-s. 1, by the Trustee Act, 1894, s. 3, are not necessary to my argument.

The position of an executor is different from that of a beneficial owner; the latter can give an option of purchase, the former cannot. An option to purchase is not a realization of the estate at all. Sargant J. thought that *Oceanic Steam Navigation Co.* v. *Sutherberry* (1) showed that an executor was not in the position of an absolute owner, but was for many purposes in the same position as a trustee.

It is said that s. 44 of the Trustee Act, 1893, is an enabling section and does not contain a prohibition. It is sufficient to say that the section recognized existing law, which prohibited a trustee from selling the surface apart from the minerals without the leave of the Court. It has never been suggested that a trustee with a power of sale was not bound in such a case to come to the Court.

It is submitted therefore (1.) that an executor cannot escape from s. 44 because he is an executor authorized to sell the property of another; and (2.) that the purchaser does not get a good title unless the executor obtains the sanction of the Court to the sale.

Maugham K.C. in reply. The only question is whether the title is a good one. The Court cannot decide more than that.

The Confirmation of Sales Act, 1862, did not apply to executors, but applied only to instruments. Sect. 44 of the Act of 1893 is no restriction upon trustees or executors who aliunde have power to do what has been done here without coming to the Court. Sect. 44 does not derogate from any right which an executor has virtute officii.

Cur. adv. vult.

1922. July 27. LORD STERNDALE M.R. I have had the advantage of seeing the judgments to be delivered by the

(1) 16 Ch. D. 236.

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other members of the Court, and as I agree with them, and it is important that judgment should be given promptly in this case, I do not propose to delay it by writing a separate judgment of my own.

SCRUTTON L.J. The question in this case arises on a vendor and purchaser summons taken out by the executors of the late Duke of Sutherland to determine whether, as such executors, they are entitled to sell to the Staffordshire Potteries Waterworks Company certain minerals severed from the surface land above them without asking for, and obtaining, the sanction of the Court. We were told that the Waterworks Company were buying certain surface land for the purposes of their undertaking, and, desiring that their surface land and works should not be interfered with by operations in the underlying minerals, were also purchasing a "cone of support" to their surface land. Such a cone naturally projects beyond the vertical limits of the surface land supported; and, as to the portions beyond such limits, by the purchase they are severed from the surface land vertically above them.

To one approaching this question with an open mind, unprejudiced by any previous acquaintance with the decisions and statutes supposed to apply, the first answer to such a question is, "Why should not the executors deal with the land in such a way?" It is very common in mining districts to find the surface land and subjacent minerals vested in different owners. The surface land is useful for one set of purposes; the minerals for another. The common link, the fact of, and the legal right to, support of the surface land by the minerals may be dealt with in various ways, according as ordinary law is modified by contract. But in view of the decisions and subsequent statutes this answer is not sufficient.

The applicants and appellants are executors dealing with the land as personal representatives. As such they are the creation of the Land Transfer Act of 1897, described in the title as "An Act to establish a real representative," which it does by never using that phrase again. Sect. 1 vests certain classes of lands, which I understand include the land in question

here, in the personal representative "as if it were a chattel real." Sect. 2, sub-s. 2, gives the personal representative as to real estate the same powers as he would have if the real estate were a chattel real vesting in the personal representative, with one exception—namely, that one executor of several cannot give a good title to land, though he can to chattels real. What, then, were the powers of an executor as to chattels real, or terms of years in land? The answer is, I think, correctly given in Williams on Executors, 10th ed., at p. 707: "Executors and administrators may, by virtue of their office, dispose absolutely of terms for years, which are vested in them in right of their testators or intestates; and may make a good title, even against a specific legatee, unless the disposition be fraudulent." The purchaser's "title is complete by sale or delivery; what becomes of the price, is no concern of the purchaser": per Lord Thurlow in *Scott* v. *Tyler*. (1) The executor may absolutely sell the whole or part of the assets, or mortgage them. As to terms of years, it has been held that one executor out of several may validly sell, that is, assign, the whole of a term of years (2): *Simpson* v. *Gutteridge* (3); see also *Cole* v. *Miles*. (4) It is this power of one executor in respect to chattels real which is expressly excluded by the end of sub-s. 2 of s. 2 of the Land Transfer Act, 1897, which therefore impliedly recognizes the power of executors to sell a chattel real, or land vesting in them. But if the executors purport to deal with the land in an exceptional way, this is notice of irregularity to the purchaser. If he then takes the land he takes it subject to the burden of showing it was the best way of administering the assets, and may require proof of this before he accepts title. Thus in *Keating* v. *Keating* (5), where executors, some twenty years after the testator's death, granted a lease to commence on the expiration of an existing lease with some fifteen years to run, Sir E. Sugden said that while he would not interfere with an ordinary lease by an executor, this was an unusual lease, which must be

(1) (1788) 2 Dick. 712, 725.
(2) Dyer, 235.
(3) (1816) 1 Madd. 609, 615 et seq.
(4) (1852) 10 Hare, 179.
(5) Ll. & G. temp. Sug. 133.

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supported by the grantees by proving it was in the usual administration of the estate. In the same way, in *Oceanic Steam Navigation Co.* v. *Sutherberry* (1), relied on by Sargant J., the executor made a short underlease of a term with an option to purchase at the end of the underlease at a price fixed on the granting of the underlease. The Court of Appeal held such an option of future sale was, on the face of it, beyond the powers of an executor or administrator. It appears to me that the learned judge has proceeded on the view that the present case comes within the class of an obviously irregular or unusual mode of exercising powers. He says: "It is clear that to split land into layers and sell some one of these layers separately, as when surface only or minerals only are sold, is to deal with land by a method which is peculiar or unusual." So far as the learned judge makes a finding of fact of peculiarity or unusualness, there was no evidence before him, and he must be proceeding on his own judicial knowledge. I therefore am at liberty to use the same source of knowledge, and I should respectfully have said that in mining districts it was not peculiar or unusual to have mines and surface in different hands, but quite ordinary and common. Indeed, in the present case, the purchaser desires to buy surface and sufficient minerals to support it, and it is only the necessity of adequate support that divorces certain minerals from the surface land over them. It may be that the key of the learned judge's judgment is in the words that follow—to split land into layers, etc., "has been expressly recognised as outside the power or discretion of ordinary trustees for sale. And it follows, therefore, in my judgment, that legal personal representatives were under a similar disability with regard to leaseholds." This sends one to a consideration of the authorities and statutes.

In *Buckley* v. *Howell* (2) Romilly M.R., purporting to follow *Cholmeley* v. *Paxton* (3), held that trustees for sale could not sell land apart from the subjacent minerals. This was rested on the analogy of timber, and on a consideration

(1) 16 Ch. D. 236. (2) 16 Beav. 546.
(3) (1825) 3 Bing. 207.

of the position of a tenant for life without impeachment of waste. This decision is treated by Rigby L.J. in *In re Gladstone* (1) as turning on the provisions for reinvestment of proceeds of sale, and by Lindley L.J. in the same case (2) first, as relating to a sale and not to a lease, and, secondly, as "having been got rid of" by the Act of 1862. Obviously neither Lord Justice approved of the decision. In fact the Legislature in the Confirmation of Sales Act, 1862, did legislate because of the decision. In the first place they confirmed all existing sales not already adjudicated upon, or in process of adjudication which would otherwise be invalidated by the decision; secondly, unless the instrument creating the trust or power of sale forbade severance, the Act authorized it, if previously sanctioned by the Court of Chancery. In my view this Act was limited to powers of sale created by an instrument, and had no relation to powers of sale inherent in the person of an executor, although that executor was appointed by an instrument, that is, the will. The executor as such had then clearly power to sell, that is, to assign, terms of years; the decision of Lord Romilly had nothing to do with executors, or terms of years, and the Legislature in mitigating the effects of that decision was not considering executors or terms of years. Their powers as to such terms remained unaltered. Indeed, the executor of a term of years of land and minerals would either have power in the lease to work the minerals, which would define his powers of assignment, or would have no such powers, in which case the contingency of a separate assignment of minerals would never arise. In my view, therefore, the statute of 1862 did not in any way effect the rights of executors to assign chattels real, which remained under the general law of executors' powers as stated above.

But in 1893 the Trustee Act of that year (56 & 57 Vict. c. 53) repealed the Act of 1862, and substituted s. 44. This section as passed applied to "trustees," which, by the Act of 1894 (57 Vict. c. 10), s. 3, was extended to "trustees and other persons," and s. 50, the definition clause of the Act

(1) [1900] 2 Ch. 101, 106. (2) Ibid. 105.

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of 1893, includes, unless the context otherwise requires, in trustees persons having "the duties incident to the office of personal representative of a deceased person," which at that time, the Act of 1897 not having yet been passed, did not include duties as to land, except in the case of debts charged on land. This section does not purport to invalidate any severance of land or minerals, or contain any provision that the validity of such a transaction should depend on the sanction of the Court being obtained. If there were persons falling within the description of the section who had, before its passing, the legal right to sever land and minerals on sale, the section did not in my view take away that right. It may have given such persons power to protect themselves and purchasers from them by obtaining the sanction of the Court in cases otherwise doubtful, but in my view it is an enabling section, not a section destroying existing rights.

In 1912 Neville J. had to consider in *In re Cavendish and Arnold's Contract* (1) whether an executor selling real estate could sever land and minerals. His attention was not called to the definition clause (s. 50), and he decided that an executor could so sell, because he was not included in either the Act of 1862 or the Act of 1893. The decision was reported in the Weekly Notes. (1) But on his attention being subsequently called to the definition in s. 50, he requested that the case should not be further reported. His reasons obviously required reconsideration, and the case as so reported would not bind a judge of co-ordinate jurisdiction. In *In re Wicksted's Trusts* (2) Russell J. was asked to sanction a severance by an executor, and did so; as I think the Trustee Act, s. 44, authorized him to do. But he took occasion obiter, and having heard argument on one side only, to remark that not only could he give the sanction, but "it was necessary for the executor to obtain it." Sargant J., for the reasons I have stated, has taken the same view. While I hesitate to differ from two learned judges more familiar with the subject matter than I am, I have come to the

(1) [1912] W. N. 83. (2) [1921] 2 Ch. 184.

conclusion that Neville J.'s result was right, and that the dictum of Russell J. and the decision of Sargant J. were erroneous.

In my view the executor had the power to dispose of chattels vested in him, including chattels real, by sale or assignment, either of whole or part, in the ordinary way, and to give a good title to the purchaser, though the sale in fact was not necessary for administration. If severance of land and minerals was an ordinary way of sale the executor could so sever in selling. In my view the Act of 1862 did not apply to executors at all, but was limited to trusts for or powers of sale created by instruments, and not by the ordinary law. The Act of 1893, if it applied to executors and gave them power to protect themselves by sanction of the Court, on which I express no final opinion, did not, I think, take away the power they already possessed of selling in the ordinary way without the sanction of the Court so as to give good title. Further, I am of opinion as a matter of fact that sales by severance of land and minerals are in mining districts an ordinary way of selling land.

I think it right to say that the question of sales of minerals with rights over surface land not sold, or sales of surface land with rights over minerals not sold, which may give rise to the question debated in *Dayrell* v. *Hoare* (1), does not arise in this case, and was not argued before us. The question whether sale with such burdens on land not sold is the only possible or reasonable way of sale may be relevant when, if ever, the question is raised.

In my view it should be declared that the executors are entitled to sell these minerals severed from the surface land without obtaining the sanction of the Court, and that the vendors' answer to the requisition on this subject is a good one.

YOUNGER L.J. This case, as the learned judge says in his judgment, raises in the simplest and neatest form the important general question whether executors, in whom

(1) (1840) 12 Ad. & E. 356.

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under the Land Transfer Act, 1897, freeholds of a testator are vested, have power to sell the minerals apart from the surface without first, or at some time, obtaining the leave of the Court for that purpose. In view of the terms of the Land Transfer Act, s. 2, sub-s. 2, it would appear that the answer to this question depends upon the answer to the further question whether the executors would, when the Act passed, have possessed this power had the property in question been chattels real of their testator vested in them as his executors. It is, I think, important at once to draw attention to this test. Very different considerations would or might apply to this appeal if the powers over the testator's freeholds now vested in his executors by the statute in question had been conferred upon them with reference, say, to their powers of sale under Lord St. Leonards' Act in cases where a testator had charged his real estate with payment of his debts or legacies, and had not devised the hereditaments so charged to trustees. The powers in question now vested in the executors are conferred not in the terms of so limited and restricted a power—a power taking effect under, and in accordance with, the terms of their testator's will—but by reference to a power overriding altogether the provisions of the will, a power so wide as to enable them both at law and in equity to dispose absolutely and without qualification of the whole personal effects of their testator for the general purposes of the estate. It cannot, I think, be doubted that, apart from any statutory restriction, if any such there was, executors at the passing of the Land Transfer Act possessed, as they had possessed from time immemorial, the fullest power by virtue of their office to dispose absolutely as of other chattels so of terms of years vested in them in right of their testators; nor were they debarred from adopting any method of disposition of these chattels real which commended itself to them as being best calculated to secure the most favourable price; and if the transaction was in truth and in fact a sale, no purchaser was—except, of course, in the case of a patent fraud—under any responsibility either to consider or inquire whether there was any occasion for the sale, or whether the

method chosen was actually the best way of realizing the asset. *Oceanic Steam Navigation Co.* v. *Sutherberry* (1) contains, in my judgment, nothing to the contrary of this. The unusual method of disposition adopted there, with reference to which Sir George Jessel M.R. intimated that those accepting the title must take it subject to the question whether the mode of dealing with the property was the best way of administering the assets—was a grant of an under-lease with an option to the under-lessee over a period of years to purchase the lease at a fixed price. It was not a sale at all. The sub-lease was no sale, nor was the option. The agreement did not require the sub-lessee to purchase, but it did prevent the executors from obtaining from any other person, without the option holder's consent, and while the option continued, any better price, and it required the executor to sell to the option holder, if so required by him, at the fixed price, irrespective of the actual value of the property at the date of the exercise of the option. I think the learned judge has carried the *Oceanic Case* (1) further than it can properly be carried. The transaction there held to be beyond the power of an executor was really treated as being no disposition at all. But a contrast of that case with the decision in *Evans* v. *Jackson* (2), in which it was held that a bequest of leaseholds to executors upon trust to sell did not in any circumstances justify any underlease, illustrates how much more extensive even in this matter are an executor's over-riding powers than are those of mere trustees for sale. In my judgment, therefore, neither the *Oceanic Case* (1), nor any other authority to which our attention was directed, serves to call in question the power of executors in disposing of their testator's chattels real to sell surface apart from minerals, or minerals apart from surface. True, the instances in which such a power of disposition has been open to executors must have been few. They must almost have been confined to cases in which the testator had specially reserved to him as the holder of the lease power to assign the two separately. This must very rarely have happened, and no instance either of the existence or of the exercise by

(1) 16 Ch. D. 236. (2) (1836) 8 Sim. 217.

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an executor of such a power was brought to our notice. It seems to me, however, to go without saying that such a power, if it had been reserved by contract to the lessee, presumably because of its advantage to himself, must necessarily be exercisable by his executors if they thought fit to exercise it in the course of realization of his assets. I think, therefore, that unless to any extent it was affected by statute, this over-riding power of the executors did enable them, if the property here had been leasehold, to sell, as they have done, minerals apart from the surface, and that without putting the purchaser upon any inquiry whatever.

But even if, contrary to my own view, the qualification indicated by Sir George Jessel M.R. in the *Oceanic Case* (1) applied to a sale by executors, I am very clearly of opinion that a sale of minerals apart from surface is not such an unusual method of disposing of a mineralised estate as that the purchaser here would take the minerals subject to the question whether the mode of dealing with it was the best way of administering the testator's property. Not only, as appears from standard works on conveyancing, has it become usual to insert such a power in all well-drawn trusts for sale of hereditaments which it is anticipated may be mineralised, but the power is conferred on tenants for life by s. 17 of the Settled Land Act, 1882, and on a sale of an estate in lots, as this is, it has now, I think, become almost notorious that if the minerals be not disposed of apart from the surface it is practically not possible for the vendor to secure any price at all, certainly not any adequate price for them. In my judgment, therefore, if the vendors here may rely on their over-riding power of sale, unaffected by any statute, then they are in a position to confer a good title in these minerals upon the purchaser. But it is said that they cannot confer such a title without the sanction of the Court, and s. 44 of the Trustee Act, 1893, is referred to as governing their position in the matter. It is not difficult to trace the history of that section. It begins with the decision of Sir John Romilly in *Buckley* v. *Howell* (2), in which, in the

(1) 16 Ch. D. 236. (2) 29 Beav. 546.

case of a settled estate, and applying the very doubtful analogy of a sale of timber without the land, the Master of the Rolls held that a power of sale and exchange did not authorize trustees to sell the lands with a reservation of the minerals. The decision startled the profession, and as Lindley M.R. said in *In re Gladstone* (1), the Legislature thought it desirable to get rid of it, and the Confirmation of Sales Act, 1862, was passed for that purpose. Now it is quite clear that neither *Buckley* v. *Howell* (2) nor the Confirmation of Sales Act, 1862, had any reference whatever to the executor's over-riding power of sale of chattels real with which we are here concerned. The preamble shows that the statute deals only with trustees and others who " in the intended exercise of trusts or powers authorising them to dispose of land by sale, exchange, partition, or enfranchisement, have disposed of land subject to such trusts or powers with an exception or reservation of minerals . . . . such mode of disposition not being expressly authorised nor forbidden in the instrument creating the trust or power " ; that is to say, it deals only with trusts or powers contained in instruments in which it should be possible to find provisions either authorizing or forbidding a disposition in the manner stated. Sect. 2 of the statute, expressly limited in the same way, authorizes the same trustees and other persons " unless forbidden by the instrument creating the trust or power " to dispose of land with an exception of minerals, or vice versa, but only with the previous sanction of the Court of Chancery. The statute does not, it will be seen, confine the necessary intervention of the Court to cases where the property is settled. But, as I have said, it in no way extends to executors, and it was not contended by counsel for the respondents that it did. The words " or other person," however, were held to extend to mortgagees exercising their power of sale: *In re Beaumont's Mortgage Trusts.* (3) In this state of things we come to the Conveyancing Act, 1881. What a trust for sale nominally empowers a trustee for sale to do is defined in s. 35 of that Act ; what a mortgagee's power of

(1) [1900] 2 Ch. 101. (2) 29 Beav. 546.
(3) (1871) L. R. 12 Eq. 86.

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sale authorizes him to do is described in substantially identical terms in s. 19, sub-s. 1. The Confirmation of Sales Act is untouched by the Act. It therefore, so far, remains applicable to both classes of sales, but not in any way to executors. This brings us to the Trustee Act, 1893. Sect. 35 of the Conveyancing Act is thereby repealed, and s. 13 of the Trustee Act is substituted for it. The Confirmation of Sales Act, 1862, is also repealed, and for it s. 44, the section on which this present discussion turns, is substituted. Now that section, as it originally stood, was confined to a trustee; the words "or other person" of the repealed Act were not inserted. It must have occurred to the Legislature that the omission of these words deprived mortgagees of their privileges under the earlier Act. The words "or other person" were therefore reinserted by s. 3 of the Trustee Act, 1894. Did the section in that form extend to executors? I need not read it again. On its construction, and not ignoring its legislative history, I can have no doubt that, apart from s. 50 of the statute, to which I will later allude, it did not. In my judgment s. 44, like s. 2 of the Confirmation of Sales Act, 1862, is only applicable to cases where the disposition is authorized by some special instrument. I cannot myself doubt that the decision of Neville J. in *In re Cavendish and Arnold's Contract* (1) upon this section, apart from s. 50, was absolutely right. But the attention of the learned judge was not in that case directed to s. 50 of the Act, which says that unless the context otherwise requires, "The expressions 'trust' and 'trustee' shall include . . . . the duties incident to the office of personal representative of a deceased person." Does this interpretation of the word "trustee" dispose of the decision of Neville J.? Russell J. in *In re Wicksted's Trusts* (2) was of opinion that it did. Sargant J. in this case has taken the same view. Russell J. in *In re Wicksted's Trusts* (2) stated it to be his clear opinion that the Legislature, when it used the words in s. 44, "Where a trustee or other person is authorised to dispose of land by way of sale," and so on, intended to include a person in the position of a

(1) [1912] W. N. 83. (2) [1921] 2 Ch. 184.

legal personal representative of a deceased person. The case before him was unopposed, and I cannot help thinking that he might have hesitated to express that opinion so confidently if the history of the section had been laid before him as fully as it has been before us. Sargant J.'s judgment to the same effect is mainly based upon the view that the exception in the section of cases where the instrument of trust contains a provision to the contrary "does not involve the hypothesis or assumption that the Legislature is dealing only with cases where there is an actual instrument in which it should be possible to seek for provisions to the contrary, while, further, were it necessary that there should be such an instrument the probate or letters of administration under which the legal personal representatives act would seem to satisfy the description sufficiently." Here again the learned judge might, I think, have modified his view if the antecedents of the section had been more fully present to his mind. When I consider the frame of the section, its amendment to include under the words "or other person" the mortgagee included under the earlier Act, the fact that in 1893 the over-riding powers of the executor over his testator's chattels real would only, in the general case, be exercisable by him as a power to sell minerals separately when his testator had stipulated for the privilege, I should be prepared to hold that the context required that the section should not extend to legal personal representatives at all. But this may be going too far. I therefore content myself with holding that while the section may have extended to a sale by an executor of his testator's freeholds under Lord St. Leonards' Act, it never has extended to any sale by him of leaseholds by virtue of his over-riding powers as executor. I arrive at that conclusion on one of two grounds, either of which suffices, as I think, to justify it. The first is that in the exercise of that power an executor is not acting under an instrument which may prevent or allow a separate sale. He is acting irrespectively of the terms of any instrument, and in my judgment s. 44 is not in this respect different from the section which it superseded. But my second ground is this, that treating the executor

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for all purposes as a trustee referred to in the section, then to construe the section as depriving him of his clear pre-existing powers in this behalf would be to derogate from a power then possessed by him, and would run counter to sub-s. 3 of the section.

In my opinion, therefore, the appeal should be allowed, and a declaration should be made as asked by the vendors.

Solicitors: *Doyle, Devonshire & Co., for Kent & Jones, Longton, Stoke-on-Trent; Doyle, Devonshire & Co., for Knight & Sons, Newcastle-under-Lyme.*

G. A. S.

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FASBENDER *v.* ATTORNEY-GENERAL.

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KRAMER *v.* ATTORNEY-GENERAL.

Aliens—Nationality—British-born Woman—Marriage to German National in Time of War—Loss of British Nationality—Dual Nationality—German National also British Subject—Property in England—Charge under Treaty of Peace Order, 1919, *s.* 1, *cl.* (*xvi.*)—*Treaty of Peace, Art.* 297—*British Nationality and Status of Aliens Act,* 1914 (4 *& 5 Geo.* 5, *c.* 17), *s.* 10.

A British-born woman, between the date of the signing of the Peace Treaty between England and Germany and the date of its coming into force, went to Germany and there married a German subject. At the date of her marriage and on January 10, 1920, when the Treaty came into force, she was the registered holder of shares in an English limited company:—

Held, that under s. 10 of the British Nationality and Status of Aliens Act, 1914, she must be deemed to be an alien, and by her marriage, which was not invalid, she had lost her British nationality and became a German national, so that her shares were subject to the charge imposed by s. 1, cl. (xvi.), of the Treaty of Peace Order, 1919.

Decision of Russell J. [1922] 1 Ch. 232 affirmed.

The Treaty of Peace Order, 1919, affects the property in this country of a German national although, by the law of England, he may also be a British subject, and thus possess a dual nationality:—

So held by Lord Sterndale M.R. and Warrington L.J.; Younger L.J dissenting.

Decision of Astbury J. affirmed.

In re Chamberlain's Settlement [1921] 2 Ch. 533 affirmed.

THESE two appeals were heard together. The first was from the decision of Russell J. in *Fasbender* v. *Attorney-*

General. (1) The second was from the decision of Astbury J. in *Kramer* v. *Attorney-General*, in which he held himself bound by that of P. O. Lawrence J. in *In re Chamberlain's Settlement.* (2)

The facts in *Fasbender* v. *Attorney-General* were as follows: The plaintiff was born at Lincoln in 1876, and was the daughter of British subjects. Before the outbreak of war between this country and Germany she had become engaged to be married to one Ernst Fasbender, a German subject, resident in Germany. The Treaty of Peace between the Allied and Associated Powers and Germany was signed at Versailles on June 28, 1919, but did not come into force until January 20, 1920. Until that date, notwithstanding the cessation of hostilities and the signing of the Treaty, Fasbender was and continued to be an enemy. In October, 1919, the plaintiff obtained a passport and proceeded to Germany, where on November 3, 1919, she was married to Fasbender. On each of the above-mentioned dates the plaintiff was the registered holder of certain fully paid shares in an English limited company. These shares were taken by the Public Trustee as custodian of enemy property, and he claimed that, by her marriage, the plaintiff had become a German national, and that her property had become subject to the charge on the property of German nationals created by the Treaty of Peace Order, 1919, and he, as the Custodian acting under the general direction of the Board of Trade, declined to exercise in her favour the power vested in him under the Treaty of Peace Order, 1919, as amended by the Treaty of Peace (Amendment) Order, 1920, to release her property from the charge. The plaintiff contended that she is and was at all material times a British subject, and not a German national, and she brought an action claiming a declaration that her property in England on January 20, 1920, was not subject to any charge under the Treaty of Peace with Germany or the Treaty of Peace Order, 1919.

Russell J. held (1) that the plaintiff's shares were subject

(1) [1922] 1 Ch. 232. (2) [1921] 2 Ch. 533.

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to the charge imposed by s. 1, cl. (xvi.), of the Treaty of Peace Order, 1919, on the property in this country of alien enemies and dismissed the action.

The plaintiff appealed.

In *Kramer* v. *Attorney-General* the agreed facts on which the issue of the appeal depended were as follows : The appellant was born at West Hartlepool on January 19, 1867. His father, who was a German, was in business at Hartlepool. Whether or not he had then lost his original German nationality was not agreed between the parties, but it was agreed that in 1869, having returned to Germany, he obtained there a grant or regrant of German nationality for himself and his infant children, including the appellant, who was educated in Germany, and on the completion of his education required to serve and did serve in the German army for one year commencing on April 1, 1888. At the close of his military service he left Hamburg for Siam, where he took up his residence. Being informed by the German officials at Bangkok that he would be required to enter his name in the register of the German Consulate there on pain of being treated as a deserter from the German army, and sent back to Germany under arrest on the next available warship, the appellant caused his name to be entered in the German Consulate register in Bangkok, and he received a document recording his registration. In 1917 when Siam declared war against Germany he was arrested by the Siamese authorities as a registered German national, and was deported to India, where he was interned. Towards the end of 1919 he was taken by the British authorities on a British vessel and landed in Germany. From 1869 to 1920 he was never in England. In these circumstances the question arose whether certain property belonging to him in England at the date when the Treaty of Peace Order, 1919, came into effect was or was not by s. 1, cl. (xvi.), of that order, charged with the obligations therein specified. The plaintiff (appellant) brought an action for a declaration that the property was not so charged. Astbury J., following the decision of P. O. Lawrence J. in *In*

re Chamberlain's Settlement (1), dismissed the action. He held that on the true view of the construction of the Treaty of Peace with Germany and the Treaty of Peace Order, 1919, the expression "German nationals" included, and was intended to include, all persons who according to German law answered that description, whether they had also any other nationality or not, and that the plaintiff being a German national his property, notwithstanding that he was also a British national, was charged by s. 1, cl. (xvi.), of the Order.

The plaintiff appealed.

Wallington and *Richard O'Sullivan* for the appellant in *Fasbender* v. *Attorney-General*. It is said that by s. 10 of the British Nationality and Status of Aliens Act, 1914, the appellant being the wife of an alien must be deemed to be an alien. The first question that arises therefore is as to the validity of her marriage. That must be determined by the law of the domicil. If by that law the marriage was forbidden then it was wholly void. It was a contract forbidden by English law, and was wholly void. That being so it could not operate to divest the appellant of her British nationality. The marriage was void, as being contrary to the law of the domicil: *Brook* v. *Brook* (2); *Sottomayor* v. *De Barros* (3); *In re De Wilton*. (4)

It is said that the appellant by going to Germany with the intention of marrying a German lost her domicil of origin. The onus of proving that lies upon the Crown: *Winans* v. *Attorney-General*. (5)

[LORD STERNDALE M.R. Upon the question of domicil there was no finding of fact by the learned judge. The matter was dealt with on nationality and not upon domicil.]

Regarded as a civil contract the marriage was void. The appellant being a domiciled Englishwoman could not in time of war contract a valid marriage with an enemy alien.

(1) [1921] 2 Ch. 533.
(2) (1861) 9 H. L. C. 193.
(3) (1877) 3 P. D. 1.
(4) [1900] 2 Ch. 481.
(5) [1904] A. C. 287.

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At common law it is not competent in time of war for any subject to enter into a contract to do anything which may be detrimental to the interest of his own country: *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1)

The prohibition of intercourse with alien enemies is not limited to commercial intercourse or trading: *Robson* v. *Premier Oil, &c., Co.* (2)

By contracting or attempting to contract the marriage in this case the appellant was guilty of treason: *Rex* v. *Casement.* (3) She was in effect "adherent to the King's enemies." The rule is laid down in *Esposito* v. *Bowden.* (4)

Sect. 10 of the British Nationality and Status of Aliens Act, 1914, upon which the Crown rely, is only operative in time of peace: *Rex* v. *Lynch* (5) and *Ex parte Freyberger* (6), where it was held that a British subject cannot in time of war make a declaration of alienage under ss. 13 and 14 of the same Act. The appellant in contracting the marriage was doing a voluntary act and was therefore in the same position as Lynch and Freyberger in the cases above cited. If it be held that the appellant is a German national and a German national only then the question of dual nationality does not arise. If however the question does arise it is submitted that the decision of P. O. Lawrence J. in *In re Chamberlain's Settlement* (7) is wrong and should be overruled. The Treaty of Peace with Germany could not of itself create a charge upon the property of a British subject. It is said that under art. 297 of the Treaty and clause 4 of the Annex the property of a British subject may be taken if he happens to be also a German national. But those sections do not authorize any such taking. The Treaty of Peace Order, 1919, does not carry the matter any further. The Crown cannot take the property of a British subject without express statutory authority: *London and North Western Ry. Co.* v. *Evans* (8); *Newcastle Breweries, Ld.* v. *The King* (9); *Western Counties*

(1) [1918] A. C. 260, 276.
(2) [1915] 2 Ch. 124.
(3) [1917] 1 K. B. 98.
(4) (1857) 7 E. & B. 763.
(5) [1903] 1 K. B. 444.
(6) [1917] 2 K. B. 129.
(7) [1921] 2 Ch. 533.
(8) [1893] 1 Ch. 16.
(9) [1920] 1 K. B. 854.

Ry. Co. v. *Windsor and Annapolis Ry. Co.* (1); *Pedlar* v. *Johnstone.* (2)

On the Treaty as a whole whenever the word "nationals" is used the intention is to refer to nationals of the particular State only. "German nationals" in the Treaty means German nationals only and nothing else.

[The following articles of the Treaty were referred to: 36, 53, 84, 150, 179, 278, and 297.]

Sir J. Simon K.C. and *Whinney* for the appellant in *Kramer* v. *Attorney-General.* The expression "German national" in the Treaty of Peace Order, which must be interpreted in the light of the Treaty as a piece of British municipal legislation, means a person of German and no other nationality; it does not include a person of dual nationality: art. 296 (*b*), 297 (*b*), and 298 of the Treaty and s. 1, cl. (xvi.), of the Order in Council.

Gavin Simonds (*Sir E. Pollock A.-G.* with him) for the Crown. First as to *Fasbender's Case.* Two points have to be considered: (1.) Was Mrs. Fasbender on January 10, 1920, a British national? In order to prove that she was she must show that s. 10 of the Act of 1914 is not applicable to her case. It is said that when the section refers to the wife of an alien it means a person who is in English law the wife of an alien, and that according to English law her marriage to Mr. Fasbender was no marriage at all. (2.) Assuming that the marriage was valid yet it is said that the section must be read sub modo. But it cannot be said that a marriage between an Englishwoman and an alien enemy is necessarily no marriage at all: *Doe* v. *Jones.* (3) The appellant's marriage is undoubtedly valid under German law and she is now the lawful wife of an alien, and falls within s. 10 of the Act of 1914.

Then as to *Kramer's Case.* The question whether he is a German national depends upon German law, and according to that law he is certainly a German national, notwithstanding

(1) (1882) 7 App. Cas. 178, 188. (2) [1920] 2 I. R. 450, 462.
(3) (1791) 4 T. R. 300.

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that he may also be a British national. Cockburn on Nationality, p. 185, shows that in construing a treaty of this kind the Court must consider not only the interests of individuals but also of the contracting States.

[He also referred to *The Ann Smith*. (1)]

Wallington in reply on *Fasbender's Case*.

Whinney in reply on *Kramer's Case*.

Cur. adv. vult.

July 26. LORD STERNDALE M.R. The question in *Fasbender's* v. *Attorney-General* is whether certain property of the plaintiff is subject to a charge under the provisions of the Treaty of Peace Order in Council, 1919. That Order was made for the purpose of carrying out the provisions of the Treaty of Peace with Germany, and by the Treaty of Peace Act, 1919, has the force of an Act of Parliament. The ground on which it is sought to charge the property is that the plaintiff was, on January 10, 1920, the date of the termination of the war with Germany, a German national. To this the plaintiff makes two answers, (1.) that she has never acquired a German nationality at all, and (2.) that if she has acquired such a nationality she has not lost that of her birth, that is British, and is therefore a person of dual nationality. In that case she contends that she is not a German national within the meaning of the Order and the Treaty, both of which, according to this contention, refer to German nationals who are not nationals of any other State or at any rate not of Great Britain.

The facts are short, and not in dispute. The plaintiff, who was a Miss Dawson, had been for some time before the war engaged to be married to Ernst Fasbender, a German resident in Germany. The Treaty of Peace with Germany came into force, and the war came to an end, on the deposit of the last ratification, on January 10, 1920. Before that date, but after the signature of the Treaty, the plaintiff obtained a passport, left England, and arrived in Germany. Shortly afterwards she went through a ceremony of marriage with Mr. Fasbender,

(1) (1868–9) Report of Commissioners on Naturalization, vol. 25, App. 86.

and they have since then lived as husband and wife in Germany. The plaintiff went to Germany for the purpose of being married in fulfilment of the long standing engagement between her and her present husband, and with no other purpose, and although there is no evidence on the subject I have no doubt that she did so under the impression common to her, and many others, that the war between this country and Germany was at an end on the signature of the Treaty. If this be an effective charge upon the property it certainly is a very hard case upon her, but such considerations cannot affect our decision. The Crown has power to release the charge in a proper case under s. 1, cl. (xvi.), of the Order. This power is exercised through the Board of Trade, but in this case, for some reasons not disclosed to us, very possibly sufficient, they have not thought fit to exercise that power up to this time. It is, however, still open to them to do so on a proper application.

The question of her nationality depends upon s. 10 of the British Nationality and Status of Aliens Act, 1914. By that section it is provided that the wife of an alien is deemed to be an alien, and if the plaintiff's marriage be valid I see no reason, subject to a point to be discussed hereafter, why she is not, under this section, to be deemed a German. The first question, therefore, is whether the marriage is valid. I think the evidence clearly establishes that it is a valid marriage in Germany. It was, however, contended on behalf of the plaintiff that her domicil at the time was English, and that by the law of her domicil she was under a personal disability, that is, the disability of every English subject to contract marriage with an enemy in time of war, and that, therefore, she could not contract a valid marriage with an enemy alien. If it was established that she was, under the law of her domicil, under a personal disability to marry her present husband there is evidence that in German law the marriage would not be valid. I do not think this contention is sound. I have great doubts whether her domicil at the time of the marriage was English. She had left England, and become resident in Germany at the time, though she had only been there a few

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days. She had done so with the intention of being married to a German resident in Germany, and of continuing to reside there with him after marriage, and I think this is, at any rate, evidence that she had adopted a German domicil. No doubt if Mr. Fasbender had died before the marriage, or if the engagement had been broken off, she might, and probably would, have changed her intention, and come back to England, but that does not alter the fact that she went to Germany with the intention of remaining there. This question of domicil is a question of fact, and I think the person relying upon this contention should have obtained a finding of fact upon it by Russell J. No such finding of fact was obtained or asked for, and the learned judge does not mention the matter in his judgment, which confirms my view that although I entirely accept the statement of the learned counsel that the point was taken, not much stress was laid upon it. I do not, however, think it necessary to decide the question of domicil, and will assume for the purposes of this judgment that the plaintiff was a domiciled Englishwoman. The question on that assumption arises whether a marriage between her and an alien enemy during war is invalid. Assuming that such a marriage would be an act punishable by English law, I do not think that fact constitutes a personal disability in the plaintiff to contract marriage in the circumstances, and the evidence shows that in German law such a marriage is valid. We have been referred to no authority to show that it is invalid in English law, except those cases which deal either with contracts or with the general prohibition against intercourse with the enemy, and in none of them was the question of marriage in any way before the Court. Many contracts no doubt made in war time with an enemy are void, but marriage is not only a contract, it is a transaction involving and establishing status, and in the absence of authority I am of opinion that there is nothing in our law to render the marriage of a domiciled Englishwoman with an alien enemy an invalid marriage. Therefore, subject to the point mentioned before, I think the plaintiff was, by virtue of s. 10 of the Act of 1914, a German national on January 10,

1920, and not a British national. I must, however, deal with that point.

The learned counsel for the appellant contended that according to the principle of *Rex* v. *Lynch* (1) and *Ex parte Freyberger* (2), decided upon ss. 13 and 14 of the same Act, s. 10 had no operation during the war. In one form the contention was put that the section was suspended during the war, and in another that as the act which was said to constitute the plaintiff a German national, that is marriage, was a voluntary act, she was in the same position as Lynch and Freyberger, and therefore the section did not operate. I can see nothing in the Act suggesting any suspension during war, and there seems to me to be a wide distinction between a British national seeking to take advantage of an enabling provision of the Act to escape his liabilities and obligations under English law, which was the case in the authorities cited, and a British national doing an act which brings a provision of the Act down upon her in invitam. I am quite content on this point to accept the reasoning of Russell J. I agree with it, and I see no use in repeating it.

I wish to say that throughout I have been dealing only with a marriage bona fide contracted without any ulterior motive, I say nothing about the case of a marriage collusively contracted for the purpose of obtaining a different nationality; if such a case arise I will then do my best to deal with the question of the consequences which result.

In this case the plaintiff was by reason of the Act of 1914 a German national and a German national only, and therefore the appeal must be dismissed.

The second question does not therefore arise in this case, but it does arise in *Kramer* v. *Attorney-General*, and therefore I proceed to deal with it, and my judgment on that question is to be taken as given in both cases.

The facts in *Kramer* v. *Attorney-General* are not in dispute, and it is clearly established by them that the plaintiff is a person of dual nationality, he has both a British and a German nationality—the question is whether he is a

(1) [1903] 1 K. B. 444. (2) [1917] 2 K. B. 129.

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German national within the meaning of the Treaty of Peace Order and the Treaty so as to subject his property to the charge imposed by the Order in Council. Shortly the facts are these. The plaintiff was born in England in 1867, his father being at that time resident in England but not naturalized. He had, however, by German law lost his German nationality. Soon after the plaintiff was born his father returned to Germany and lived there with his family. In 1869 he obtained a grant or regrant of German nationality for himself and his infant children including the plaintiff. The plaintiff remained in Germany and was educated there and he also served his term of military service in the German army. He then went to Bangkok and carried on business there. When war broke out between Siam and Germany he was arrested and deported to India, where he was interned. He was never in England between 1869 and 1920. The appeal is nominally from a decision of Astbury J. but really from the judgment of P. O. Lawrence J. in *In re Chamberlain's Settlement.* (1) The point is, I think, a difficult one, but it is nevertheless a short one, and neither demands nor admits of any lengthened discussion. I agree with the proposition that we have to consider the words of the Order in Council as those of a piece of British municipal legislation, and so interpret them, but, as this legislation is for the purpose of carrying into effect the provisions of the Treaty of Peace, I think we must have regard to the way in which the words were used in that Treaty, and indeed the learned counsel on both sides founded their arguments to a certain extent upon the terms and meaning of the Treaty. The question may be shortly stated sufficiently for practical purposes in this way, Does German national in the Order in Council and the Treaty mean a person of German nationality, and of no other, or does it include a person of German nationality, although he may be at the same time of British nationality? I think that probably the framers of the Treaty had not present to their minds the question of the consequence of a dual nationality, and they therefore did not by express

(1) [1921] 2 Ch. 533.

words either include or exclude such a case, and the question must be answered by inference from the words which they did use. The learned counsel for the appellants referred us to several articles of the Treaty other than art. 297, which is the operative one in these cases, for the purpose of showing that in those articles national must mean a national of one State only and not any one of dual nationality. They also argued that the construction contended for by the Crown would lead to remarkable, and, in some cases, absurd results and therefore should not be adopted. I do not think that either of those arguments affords any certain guide. It does not follow that the word "national" is always used in the same sense in all the articles, and I do not think it is at all clear that it was used in the articles to which we were referred in the narrow sense contended for by the appellant. There are some articles which seem to point to that meaning, there are others, one especially, which point the other way and seem to deal with persons of dual nationality, and I think a consideration of those articles gives us no certain guide either way to the meaning of the Order in Council or the Treaty. Again, on either interpretation extreme hypothetical cases can be put in which inconvenient and perhaps absurd consequences follow, and they afford no stronger argument for or against one interpretation than the other. I do not myself see that it makes any difference whether the nationality other than German is British, allied, neutral or even enemy. In the last case the Treaty with that enemy State would probably deal with the case, but it might not, and I think it would be immaterial for this question whether it did or not. I cannot see why a person of German and British nationality should be in a better position than one of German and allied, neutral or enemy nationality; in any case the question is, Does German national mean of German nationality only or does it mean of German nationality although at the same time of another? If it means the latter then the Order in Council affects the property whatever the dual nationality may be. Looking at the Order in Council and the Treaty as a whole I am of opinion that the latter is the

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true meaning. I think the governing idea is that the property of German nationals should be charged. German nationality was the thing sought, and it is no answer for the plaintiff or any one else to say, "Though it is true I am a German national I am also of another nationality," or that the Crown is seeking to affect the property of British, allied or neutral nationals without plain words. The answer seems to me to be clear—namely, that the Crown is not seeking to do anything of the sort, it is seeking to affect the property of German nationals and should not be precluded from doing so by the accident that the undoubted German national has also another nationality. When a person like the plaintiff is to all intents and purposes a German I can see no hardship on him, and nothing unconstitutional in holding that he is a German national, although he happen to have also a British nationality from the accident of his having been born in this country at a time when his father was resident though not naturalized here. I agree with the reasoning of P. O. Lawrence J. on this point. No doubt hard cases may occur when the proportion of nationality, if I may use that expression, is unequal, that is, when the British, allied or neutral nationality is much more prominent than the German, but as I have pointed out there is given by the Order in Council a dispensing power under which such hard cases can be relieved, and I hope, and have no reason to doubt, that this power is equitably exercised.

I think both appeals should be dismissed with costs.

WARRINGTON L.J. I will first read my judgment in the *Fasbender Case.*

On November 3, 1919, after the signature of the Treaty of Peace with Germany but before it came into force Mary Dawson a natural-born British subject was married in Germany to one Ernst Fasbender, a German national. For the purpose of her journey she was furnished with a passport issued by the British Foreign Office. The Treaty came into force on January 10, 1920. On this date Mary Fasbender was entitled to certain stocks and shares in an English company of which she was the registered holder. By the Treaty

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of Peace Order, 1919, made under the authority of the Treaty of Peace Act, 1919, all property, rights and interests within His Majesty's dominions or protectorates belonging to German nationals when the Treaty came into force (with certain immaterial exceptions) and the net proceeds of their sale, liquidation or other dealings therewith are charged with certain payments which it is unnecessary to specify. Mrs. Fasbender as plaintiff in the present action claimed a declaration that her property in England on January 10, 1920, was not and is not subject to any charge under the Treaty or the Order. Russell J. has dismissed the action and the plaintiff appeals.

The question is, was the plaintiff on January 10, 1920, a German national? If she was her property in this country on that date was made subject to the charge. The Attorney-General relies on s. 10 of the British Nationality and Status of Aliens Act, 1914, which provides that the wife of an alien shall be deemed to be an alien. Sect. 27 contains a definition of the expression "alien"—namely, it means a person who is not a British subject. The plaintiff seeks to avoid the apparently plain result of her marriage on two grounds: (1.) That the marriage of a British subject to an enemy in time of war was illegal and therefore void, and (2.) that s. 10 of the Act of 1914 ought to be treated as applying only in time of peace. As to (1.) the plaintiff says that the law regulating the validity of her marriage was that of her domicil, which she affirms was English, that by the law of England all intercourse with the enemy was prohibited and therefore the contract of marriage with the enemy was illegal and void. She even goes so far as to say that by contracting or affecting to contract the marriage she committed the crime of high treason.

I think there are many answers to these contentions. I will assume that her domicil was English, though I am by no means convinced that she might not properly be held to have acquired a German domicil by resorting to Germany with the intention of remaining as the wife of a German of a German domicil. Social intercourse with an enemy is, it is

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true, prohibited by our law in time of war, unless it takes place with the permission of the Crown. The plaintiff had to obtain permission to visit Germany and it was granted. A visit to Germany necessarily involves social intercourse with Germans, and I think it is right to infer that her marriage took place with the permission of the Crown and was not a prohibited act. In saying this I am not relying on the fact that her agents in applying for a passport stated as the object of her visit that she desired to be married to her present husband, because I understand the letter containing the application, though a copy was with the papers furnished to us, was not in evidence. But suppose this view is wrong, and in marrying a German she was doing what was prohibited by our law and was exposing herself to penalties, I can find no authority for saying that the marriage so contracted was void. The numerous cases on the subject of executory commercial contracts seem to me to have no bearing on the present case. To hold that a marriage is void on any such ground would introduce so much confusion into social relations that I am not prepared so to do without clear authority. The suggestion that the plaintiff was guilty of the crime of high treason seems to me a suggestion of despair. In my opinion her marriage was legal and she is the wife of an alien—namely, of a German national. As to the second point I can find no ground for saying that s. 10 of the Act of 1914 applies only in time of peace. So to hold would be to redraft the section. It follows that the plaintiff is to be deemed to have been on January 10, 1920, a German national, and her property in England on that date was subject to the charge.

On the view I take there is no question as to the effect of a dual nationality, for the plaintiff has lost her position as a natural born British subject altogether.

I think the appeal should be dismissed with costs.

KRAMER'S CASE.

The question in this case is whether the plaintiff is a German national within the meaning of the Treaty of Peace Order, 1919. If he is, then certain property of his in this

country on January 10, 1920, the date on which the Treaty of Peace with Germany came into force, is charged with the payments mentioned in the Order. The point is that while unquestionably a German national, he is also a natural born British subject, and his case is, therefore, one of dual nationality.

The action was commenced by the plaintiff for a declaration that the property in question was not subject to the charge. Astbury J. following the decision of P. O. Lawrence J. in *In re Chamberlain's Settlement* (1) has dismissed the action. The plaintiff appeals. If the appeal succeeds the judgment in *In re Chamberlain's Settlement* (1) would, of course, be overruled, and it is the judgment in that case which is virtually under appeal, the material facts being identical.

The plaintiff was born in 1867 in England of German parents; before his birth his father had lost his German nationality, but had not acquired the status of a British subject. Shortly after the plaintiff's birth his father left England, and went to live at Hamburg, taking the plaintiff with him, and in 1869 applied for, and obtained, a grant, or regrant, of German nationality for himself, and his infant children. The plaintiff was educated in Germany, and served in the German army. After his military service he settled at Bangkok in Siam, where he carried on business. On the outbreak of war between Siam and Germany he was arrested and deported to India, where he was interned. From the time his father left England in or about 1869 he was never in this country until the year 1920. He is undoubtedly and admittedly a German national under German municipal law, and he is by virtue of our law a British national.

By the Treaty of Peace with Germany by art. 297 it was provided, amongst other things, as follows: "The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this section, and to the provisions of the Annex hereto." Then (*b*): "Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and

(1) [1921] 2 Ch. 533.

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Associated powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty." Then there is another material provision towards the end of art. 297 : " Germany undertakes to compensate her Nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States." The only material part of the Annex is para. 4 : " All property, rights and interests of German Nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims therein specified of the Nationals of that Allied or Associated Power," and in the second place with the amounts due in respect of certain other claims by the last-mentioned Nationals.

By the Treaty of Peace Order, 1919, which it is not disputed was duly made under the provisions of the Treaty of Peace Act, 1919, and therefore constitutes the municipal law of this country on the subject, it was provided as follows in s. 1, cl. (xvi.) : " All property, rights and interests within His Majesty's Dominions or Protectorates belonging to German Nationals at the date when the Treaty comes into force (not being property, rights or interests acquired under any general licence issued by or on behalf of His Majesty) and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged." I need not read the provisions describing the sums with which they are charged ; the clause ends with this proviso : " Provided that any particular property, rights or interests so charged may at any time . . . . be released from the charge so created." Then in s. 2 of the Order : " The expression ' Nationals ' in relation to any State includes the subjects or citizens of that State and any Company or Corporation incorporated therein according to the law of that State and in the case of a

Protectorate the natives thereof." The schedule to the Order sets out, amongst other portions of the Treaty, art. 297 and the Annex thereto. The question is what is the true construction of s. 1, cl. (xvi.), of the Order? The construction of the Treaty is not directly in question; this document is no part of the law administered in our Courts, and any difference between the high contracting Powers as to its construction and effect can only be settled by a further agreement between them or by such other means as national differences are settled. But the Order was made for the purpose of giving legal effect in this country to the international bargain, and therefore if it could be shown that the expression "German National" in the Treaty is confined to persons who enjoy German nationality exclusively it would, I apprehend, be right to give that meaning to the same expression in the Order. We have been referred to several portions of the Treaty for the purpose of establishing that such must be the meaning of the expression, and I have considered them all. In my opinion there is no necessity for giving that restricted meaning to any one of the expressions referred to. The possibility of a person enjoying a dual nationality is well known to jurists, and it is to my mind impossible to suppose that if it had been intended to place them in a special position express provision would not have been made. Then on the construction of the Order with its meaning uncontrolled by the Treaty I can see no reason for giving to the expression "German National" any other than its proper meaning.

The plaintiff is a German national, and he is none the less so that he is also a British national. It is said he is a British national, notwithstanding that he is also a German national. This is true, and if we had to construe the expression "British national" full effect would be given to the contention. But the expression we have to construe is "German national," and for that purpose all that has to be established in my opinion is that he is such by German law. It is to be noted that if the plaintiff's contention were to succeed it would be impossible logically to include in the term persons whose

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dual nationality on one side of it is that of one of the countries allied to Germany in the war, a result which can hardly have been intended. Then it is said on the other hand there must be British nationals of German nationality also whom for various reasons our Government would desire to treat as British, and they cannot be supposed to have intended to charge the property of such persons for the purposes mentioned in the Order. The answer in my opinion is that by the proviso to s. 1, cl. (xvi.), of the Order power is reserved to His Majesty to exempt the property of such persons from the charge.

On the whole, I am of opinion that the judgment of P. O. Lawrence J. in *In re Chamberlain's Settlement* (1) and that of Astbury J. in the present case are correct, and this appeal should be dismissed.

FASBENDER'S CASE.

YOUNGER L.J. In this case I concur with the learned judge in the conclusion which he reached, and on the case as presented to him I concur entirely in his judgment and in its reasoning. There was, however, elaborated before us an aspect of the problem which I cannot help thinking was only tentatively brought to the notice of the learned judge, and was not then seriously emphasised, for it was not specifically dealt with in his judgment. It was that Mrs. Fasbender at the moment of her marriage still retained her English domicil: that a marriage between a domiciled Englishwoman and an alien enemy was by English law void and indeed a treasonable act on the part of the bride, and that even if the marriage were by German law valid—which was not on this hypothesis admitted—Mrs. Fasbender could not divest herself of her British nationality by such an act of treason.

Now it is not to my mind easy to determine whether at the moment of the actual ceremony of marriage Mrs. Fasbender, then Miss Mary Dawson, had or had not lost her English domicil of origin, and whether she had or had not acquired a new domicil in Germany. As the learned judge says,

(1) [1921] 2 Ch. 533.

Miss Dawson in October, 1919, obtained a British passport and proceeded to Germany "with no thought or design in her mind save matrimony," and it is in my judgment a very nice question whether any intention to make Germany her home can be imputed to her at any moment before her marriage with Mr. Fasbender was, in accordance with German law, actually solemnised on November 3, 1919. I can myself in the circumstances of this case, so far as disclosed to us, entertain no reasonable doubt that if for any cause that ceremony of marriage had not taken place and had been abandoned, either of necessity or of choice, Miss Dawson would forthwith have returned to England, her one purpose in going to Germany having failed of accomplishment. If therefore the learned judge's conclusions were based—and it is just possible that they were based—on the hypothesis that Miss Dawson had at the moment of her arrival in Germany lost her English domicil and acquired a new domicil of choice, and if it had been shown to us that other considerations in English law applied to the case if the fact really was that until after the actual ceremony of marriage Miss Dawson's English domicil was retained, I should myself have desired the opportunity of further considering this question of domicil on fuller materials. But I have satisfied myself that even if the domicil of this lady was at the moment of marriage English and not German, that marriage, valid as it was, apart from this circumstance, by German law, is in no way on that account avoided by English law, or is any the less a marriage recognized in this country. No authority was produced to us even suggesting that a marriage between a domiciled British subject and an alien enemy was void or even questionable: we know that such marriages were not prohibited in this country during the war and that in view of eventual possibilities they were in some cases even encouraged and timeously solemnised here between enemy prisoners of war and English girls. It is further noteworthy that in the well-known case of *Doe* v. *Jones* (1), to which Mr. Simonds called our attention, it

(1) 4 T. R. 300.

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was not even suggested, either by the Court or counsel, that the marriage then in question, one between a British-born woman in Brussels and a Frenchman at a time when the French King was at war with Great Britain, had been otherwise than perfectly valid by English law, and this is the more striking, because had it for any reason been invalid the elaborate judgments actually delivered would have been quite uncalled for, and there would have been no question left for decision by the Court. In my opinion, therefore, this marriage, if not otherwise invalid, would not be made so by the fact, if it be a fact, that at the moment of its solemnisation the bride retained her English domicil. My concurrence with the learned judge in his judgment therefore remains complete.

I desire to add one further word. This case, although it does not, as I know, stand alone, is in a class apart from most treaty cases. This lady was engaged to Mr. Fasbender before the war; her property is British in every sense; she did not leave England to keep her pre-war promise of marriage until after the Treaty of Peace with Germany had been signed, and after the conclusion of peace had been publicly celebrated on "Peace Day" in London and throughout the country. She left this country "with no thought or design in her mind save matrimony," and was furnished with a British passport, only issued at that time after due explanation given and verified of the purpose for which it was required. She left this country also before publication of the Peace Treaty Order, by virtue of which and by virtue of which alone her property even prospectively became liable to any charge. Although probably she knew and thought nothing about it, the law of this country at the time she left it in fact was that the property here even of former enemies was restorable to them on peace. To all this it may be added that if, whether prophetically warned or fortuitously, she had postponed her marriage until after January 10 following—a day neither publicly celebrated nor even proclaimed—her property, albeit without any added merit of her own, would have been preserved to her uncharged.

Such being the position of this lady it does seem clear that any grounds on which in other cases this charge may be justified can have little if any application to her.

I have said so much because I should be sorry if it were to be supposed that her failure to establish that her property is outside the charge altogether in any way weakens the strength of the case which she may properly make to the Board of Trade to have it all released to her in the exercise of the power reserved to the Board by the Treaty of Peace Order itself.

KRAMER'S CASE.

The decision of this appeal, whatever it be, affects a large number of persons other than the appellant, and it will constitute the precedent by which the destination of British property of great aggregate amount and value will be determined. Further, the appeal raises a question of the gravest constitutional importance. I have therefore thought it my duty to explore the whole matter as thoroughly as time permitted, and I make no apology for detailing the results, albeit at some length.

I have chosen from the various ways in which the question may with sufficient accuracy be stated a form of words in which the constitutional aspect of it has due prominence. In my view this is necessary if the key to the true solution of the question at issue is not to be in danger of being lost.

The question before us, as I see it, is whether an Order in Council, statutory in point of force, by which property rights and interests in this country belonging to so-called German nationals are charged with obligations imposed upon Germany by the Treaty of Versailles is effective to charge the property, rights and interests belonging to a British subject who happens to be by German law, although in no way in the view of English law, a German national also. The charge is imposed by an Order which has the statutory force of a British imperial statute. The Order provides no compensation of any kind for the interests taken. In the Treaty itself no doubt Germany has agreed with His Majesty,

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as one of the high contracting parties, to compensate her nationals in respect of these interests. But treaties are bargains between States, and no national acquires directly against Germany under the Treaty any rights in this or in any other respect. Moreover there is no evidence before us that Germany is willing, even if she be able, to make compensation to her dispossessed nationals in any adequate measure. Nor need we conceal from ourselves the fact that similar provisions to those with which we are now concerned are to be found in the Treaties of St. Germain with Austria, of Neuilly with Bulgaria, and of Trianon with Hungary, and that in the case of these countries any likelihood of compensation being forthcoming in any measure for any dispossessed national is quite out of the question. The interests really involved in the decision of this appeal are accordingly of the most extensive description; the question amounting to no less than this, whether the appellant here, and other British subjects in the same case with him, have by this, and the corresponding Orders in Council, succeeding the other peace treaties, been effectively deprived pro tanto of the rights secured to all British subjects by the thirty-ninth chapter of Magna Charta, whereby it is provided that: "No freeman shall be taken or/and imprisoned or disseised or in any way destroyed, nor will we go upon him nor send upon him except by the lawful judgment of his peers or/and by the law of the land."

An executive ordinance of merely delegated authority is hardly the place where one would look for any serious interference with primordial rights secured to the subjects of this realm by the Great Charter itself, and I feel I may hazard the statement that if this present Order is to be held effective for such a purpose it must appear clear and certain that its provisions to that end are free from ambiguity. In this connection I would invoke the language addressed to the House of Lords by Lord Halsbury in *Cox* v. *Hales* (1), where, when dealing with a habeas corpus, he said: "Your Lordships are here determining a question which goes very

(1) (1890) 15 App. Cas. 506, 522.

far indeed beyond the merits of any particular case. It is the right of personal freedom in this country which is in debate, and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed." I cite these words because I do not conceal from myself the fact that the importance of the question now raised is in its immediate application representative rather than individual. The ordinary layman, if he were asked his opinion about this appellant's nationality, would probably without hesitation answer that he was a German national, with nothing relevantly British about him. And notwithstanding a certain sympathy with this country manifested by the fact that he seems to have sent his children to England to be educated, it may well be that the appellant himself, had he been asked, would have expressed the same opinion in all his conscious years before the war. But according to the laws of this country the appellant, on the facts agreed in the case is, and he has throughout his entire life been, a British subject, owing no other allegiance, while if this Order in Council is, as contended for by the Crown, applicable to him and his British property, it is necessarily applicable also to many, possibly to multitudes of persons whose personal association with any former enemy country is as remote as has been the appellant's personal association with England. There is indeed involved in this appeal, and in this appellant's contention upon it, a principle of wide-reaching and various application. The consequences of the decision, whatever it is, will be operative in many an unlikely quarter. I have rarely been concerned in a case in which it has seemed to me so imperative for the Court to be satisfied that sound principle is applied to its consideration, regardless altogether of purely adventitious circumstances.

The appellant here was born at West Hartlepool on January 19, 1867. The nationality of his father was at birth German. In 1867 the father was in business at Hartlepool. Whether or not he had then lost his original German nationality is not agreed between the parties. What is agreed is that in 1869 the appellant's father having returned

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to Germany, obtained a grant, or regrant, of German nationality for himself and his infant children, including the appellant, who was educated in Germany, and was, on completion of his education, required to serve, and did serve, in the German army for one year, commencing April 1, 1888. At the close of his military service the appellant left Hamburg for Siam, where he took up his residence. Being informed by the German officials at Bangkok that he would be required to enter his name in the register of the German Consulate there on pain of being treated as a deserter from the German army, and sent back to Germany under arrest on the next available man-of-war, the appellant caused his name to be entered in the German Consular register in Bangkok, and he received a document recording his registration. In 1917 when Siam declared war against Germany he was arrested by the Siamese authorities as a registered German national, and was deported to India, and interned there. Towards the end of 1919 he was taken by the British authorities on a British vessel and landed in Germany. These are the agreed facts with reference to the appellant on which the issue of this appeal depends. It is further agreed that on January 10, 1920, the date of the ratification by Germany of the Treaty of Versailles, the appellant was possessed of property in this country, and it is common ground that in the circumstances above stated he retained at that date his dual nationality —that is to say, he was a German national in Germany, and by German law a German national only, and he was at the same time a British subject in England, and by English law a British subject only. The question whether the charge imposed by the Treaty of Peace Order attaches to the English property of such a person as the appellant can, in my judgment, only be satisfactorily answered if this, his essential position, is kept in view first and last, and all the time. It will meet us at every turn.

That the appellant's position of dual nationality means what I have stated it to mean perhaps hardly needs to be justified by authority. It happens, however, that some citations on the subject express the position in terms

so apposite to his case that it will be convenient shortly to refer to them: "All persons born within the dominions of the Crown," says Sir A. Cockburn—Nationality, pp. 10 and 11 "(with the very limited exception before stated),"—which does not touch the present case—"whether of British or foreign parents . . . . are to all intents and purposes British subjects, and owe allegiance to, and are entitled to protection from, the Sovereign of these Realms." "It must be remembered," he repeats later at p. 186, "that the obligations of Sovereign and subject of State and citizen are reciprocal, and that where the one owes allegiance the other owes protection." Of such an one Lord Stowell says in *The Ann Smith* (1): "He is born in this Country, and subject to all the obligations imposed on him by his nationality"; and what this involved for those in the position of the appellant during the late war is shown very strikingly in the case of *Ex parte Freyberger* (2), Mr. Freyberger being one whose status was exactly that of the present appellant. He, a German national in Germany, but a British subject here, was held liable for compulsory military service under the Military Service Act, 1916, and was held to be precluded during the war from making a declaration of alienage under the British Nationality and Status of Aliens Act, 1914, s. 14. "I find no words in the section," says Lord Reading C.J. in that case, "which limit the rights and obligations of a British subject during the period when he is also the subject of another State. The full rights are given to him as a British subject, and he must be regarded as a natural-born British subject, with the full rights and obligations of a British subject at the time he wishes to make his declaration of alienage, and cannot therefore in time of war make a valid declaration of alienage and become an enemy subject." The position is well expressed by Ridley J. in his judgment: "A man is not half a subject of one State and half of another State. It is an unfortunate thing for him in time of war if he owes a divided allegiance,

(1) (1868–9) 25 Report of Commissioners on Naturalization, App. 86.

(2) [1917] 2 K. B. 133, 135.

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but it seems to me that the true way to view the question in spite of that difficulty is to say that he is completely a subject of each State."

And the position in this respect during the war of persons like the appellant is aptly illustrated in other directions. Being a British subject, the appellant, if resident here, could not have been required to register either as an alien or an alien enemy. He was not liable to repatriation, and, apart from Order XIV. (B) of the Defence of the Realm Regulations, with reference to which his position was not different from that of any other British subject, he could not have been interned. No vesting or other order in relation to his property was permissible, and, lastly, and the circumstance is very relevant in relation to a provision of the Order in Council to which I shall later call attention, he acquired no property during the war under any licence issued by or on behalf of His Majesty, whether general or special. Such a licence in a case like his would have been uncalled for and superfluous. In other words, persons in the position of the appellant, if not actually resident in enemy country, were throughout the war neither enemies nor enemy subjects. In this country they were, and they were only, British subjects entitled in the Courts here to all the protection both of person and of property appertaining to that status. It would indeed be a strange result if persons whose position as British subjects, whether in respect of personal liberty of property, or of national service, had been so clearly defined and enforced during the continuance of hostilities were, fourteen months after the Armistice, to find that under the description of "German Nationals" their then property rights and interests in this country were charged by an Order in Council in satisfaction of German indebtedness. Stranger still that such persons liable as British subjects during the war to compulsory military service in the British forces should find, on the coming of peace, that their property was taken towards satisfaction of the Treaty of Peace obligations of the enemy against whom they had been required to fight. Such consequences would not, in my judgment, be

creditable to this country. They will not follow, if it be true to say, as I think it is, that being by English law British subjects, these people cannot by that law be anything else, in the absence of express statutory provision to that effect. This is in no way to assert that the affirmative question whether a particular person is a national of another country can ever be a question of English law. It cannot. I agree most fully with Russell J. when in *Stoeck* v. *Public Trustee* (1) he says : " Whether a person is a national of a country must be determined by the municipal law of that country. . . . . How could the municipal law of England determine that a person is a national of Germany ? . . . . In truth there is not and cannot be such an individual as a German national according to English law." But while English law cannot determine when a particular person is a national of Germany, it can, for its own purposes, determine when he is not. To be a German national an individual must always be such by German law. But every such national is not necessarily to be so regarded by an English Court, or in an imperial statute. He may in this country be invested with some special character which precludes him from bearing any other of the same description. He may be a British subject, and accordingly no German national just as, German national though he be, he is in this country, under the British Nationality and Status of Aliens Act, 1914, no alien. See s. 27 (1). It is convenient at this point to observe, and it is very important to bear in mind, that this position does not necessarily obtain where the person in question is a sujet mixte of two States of which Great Britain is not one : " There is no doubt," says Oppenheim, vol. i., p. 483, " that each of the States claiming such an individual as subject is internationally competent to do this, although they cannot claim him against one another, since each of them correctly maintains that he is its subject. But against third States each of them appears as his Sovereign and it is therefore possible that each of them can exercise its right of protection over him within third States. On the other

(1) [1921] 2 Ch. 67, 82.

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hand, a third State can treat an individual possessing two nationalities as a subject of either of the two States to which he owes allegiance. Thus an Austrian by birth who had become naturalized in Chili, but had not thereby lost his Austrian nationality, and who had become resident in England, was compelled to register in England as an alien enemy at the outbreak of the Great War." It may well be therefore, that a person described in a British enactment as a German national may in circumstances in which the description could not properly extend to a British subject, include one who is also, say by the law of France, a French national, or by the law of Spain a Spanish national, or by the law of Austria an Austrian national. But the reasoning of this judgment, so far, has led, as I think, irresistibly to the conclusion that such an enactment dealing in terms with the property in this country of persons described merely as German nationals cannot without wide words of extended interpretation be construed as touching the property of a British subject. In this country, and for such a purpose, the two descriptions are mutually exclusive. I have not, of course, been forgetful in this judgment of s. 14 of the British Nationality and Status of Aliens Act, 1914, and of the exceptional facility with which by making a declaration of alienage persons in the position of the appellant and others may cease to be British subjects. The case of *Ex parte Freyberger* (1), however, already cited very clearly shows that before such declaration has been made—and it cannot be made at all in time of war—the status of such a person as the appellant in no way differs from that of any ordinary British subject.

In my judgment, therefore, the Crown's contention on this appeal, if it is to succeed at all, must go so far as to establish that in this Treaty of Peace Order there are to be found, either expressly or by reference, provisions sufficiently comprehensive to import that the essential principle of English law on which I have been insisting—namely, that a person cannot at once be a British subject and a German

(1) [1917] 2 K. B. 129.

national—must, so far as the construction of this Order is concerned, be given the go-by.

I now proceed to consider whether any such provisions are contained in it, and it will help to a proper appreciation of the Order, with which we are ultimately alone concerned, if in the first instance we glance at some of the relevant provisions of the Treaty of Versailles itself, on which the subsequent Order is avowedly based. It was suggested to us that the Court, for the purpose of construing the Order, ought not to look beyond it and the statute which authorized it. I cannot agree. The sections 3 to 7 of Part X. of the Treaty of Versailles are by the Order specifically given full force and effect as law, and the specific provisions of the Order, with one of which particularly we have here to do, are to have effect for the purpose of carrying out the said sections. It seems to me, therefore, that these sections and any other sections of the Treaty calculated to throw light upon the sense in which any expression in them is used may be properly referred to as possibly assisting in the construction of the Order with which strictly, as I have said, we are in the last analysis alone concerned.

Most of the relevant clauses of the Treaty were referred to during the argument. I need not set them forth again here. They are available to all interested in this judgment, if not actually present to their minds. My purpose in now recurring to them is to ascertain how far the expression "German national," or its equivalent when there used, excludes a person who by the law of some other State may be possessed of a second nationality. A careful perusal of the Treaty causes me to doubt whether the expression is ever there with effect used in any other sense. Certainly such persons are normally excluded, in many instances quite clearly so. They are, I think, excluded in art. 297, which for the purpose of this case is the article immediately in point, while in at least two instances the possibility of a dual nationality is faced, and in the cases of the persons affected the clause of the Treaty applicable to German nationals in the exclusive sense ceases to be operative. It

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would be tedious to give these instances in detail. Those which follow are each of them examples of others. Art. 297 only I reserve for detailed consideration. Take, for instance, arts. 36 and 37 of the Treaty dealing with the transfer to Belgium of the sovereignty over that which had been previously German territory. The German nationals habitually resident there are definitively to acquire Belgian nationality de facto and are to lose their German nationality. It is not apparently contemplated that amongst those so described there shall either before or after the transfer be or have been as a sujet mixte a Belgo-German.

With these articles it is convenient to compare arts. 84 and 85 dealing with German nationals in territory formerly German which under the Treaty had become part of Czecho-Slovakia and art. 91 dealing with those in territory ceded to Poland. In each of these cases we have the provision already referred to, which deals with a case of dual nationality and excludes it. I take as the example the following paragraph from art. 85 : " Within the same period (that is, two years) Czecho-Slovaks who are German nationals and are in a foreign country will be entitled in the absence of any provisions to the contrary in the foreign law *and if they have not acquired the foreign nationality* to obtain Czecho-Slovak nationality and lose their German nationality by complying with the requirements laid down by the Czecho-Slovak State." To take another class of case, it is I think obvious that in art. 179, which requires Germany to prevent German nationals from being enrolled in the forces of a foreign power, she is made responsible for those only who are her own nationals exclusively. A similar observation applies to the German nationals who are to be repatriated or otherwise dealt with under arts. 220 and 221 : the German nationals whose defined interests in Russia, China, Turkey, Austria, Hungary and Bulgaria and former German territory, Germany has bound itself to acquire must surely equally be confined to nationals strictly and exclusively so-called, for in the cases supposed Germany cannot control the municipal laws of the various States mentioned, and must rely on her own law to secure

compulsory dispossession. And these examples may be indefinitely added to. One further instance only do I give, because the converse of the expression "German national" is there neatly indicated. A national of an Allied and/or associated power is in Germany an alien. The article is as follows: "Germany undertakes (2.) not to subject the nationals of the Allied and Associated Powers to any prohibition in regard to the exercise of occupations, professions, trades and industry which shall not be equally applicable to all aliens without exception."

I come now to art. 297, the article immediately in point. That article is in entire correspondence on this subject with those already referred to and makes it clear, as I think, in its introductory words, that the private property, rights and interests of any person there being dealt with are those situate in a country which, quoad himself, is "an enemy country." As I read the article in its different operative clauses it is in no way its purpose to deal with the property of an owner situated in a country of which he is, by the law of that country, subject or citizen, and the operative clauses are in entire harmony with the introductory description. The article, in other words, does not touch the property in England of a British subject, however otherwise he may be described, for the simple reason that he is not by the law of England permitted to consider England an enemy country. The reservation by the Allies in clause (*b*) of the article of the right to retain and liquidate all property, rights and interests belonging to German nationals within their territories is to my mind a striking instance, and in this critical clause, of the restricted sense in which the expression "German nationals" is being used throughout the Treaty. The reservation cannot surely be properly extended to the property of individuals who are subjects of the liquidating State, and in its view its own subjects exclusively. In a Treaty with a former enemy Power it would be undignified as well as irrelevant for any Allied Power to reserve a right over its own subjects, the exercise of which no outside Power whatever has any right to interfere with or complain of. In such a matter

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it is not to be supposed that the Allies would have condescended to make any reservation at all to their former enemies. And the same conception—namely, that the article is dealing, and is dealing only, on the one side, with nationals of one Power, and on the other side, with their property in the hands of an enemy Power—is carried out in other clauses, without, as it seems to me, any qualification. That position is, for instance, I think, as clearly envisaged in clause 4 of the Annex as it is in s. (*b*) of the article; and I have difficulty in seeing how on the whole frame of the article Germany could be required under (*c*) to compensate as one of her own nationals the subject of one of the Allied Powers whose property had been retained by his own Government. It is clear that no such retention could be authorized otherwise than by the municipal law of the owner's own country exclusively, and with that law Germany has under the Treaty no concern and for it of course she can have no responsibility. I will assume however, if I may, that this view of these clauses of the Treaty, and particularly of clause 297, goes too far, and that the effect—I confine myself for convenience to clause 297—is no more than this, that Germany authorizes and permits for the purposes of the clause the retention of any property in allied territory of any German national in so far as he is a German national. Even so the position of the appellant under the Order in Council to which I now proceed is not to my mind thereby prejudiced. For whether, even in these circumstances, the Order is effective to charge the property of a British subject must still depend upon the question whether the Order, construed as a British imperial enactment, is, on the principles I have already ventured to state, effective for the purpose.

Now it is not the law of this country that the property even of enemy subjects is confiscated on the conclusion of peace, and that it was contemplated by the Order virtually to confiscate the property of any subject of the King is, to my mind, almost unthinkable. And I desire to repeat in this further connection that even if support for the opposite view were derivable from the

Treaty the appellant's case here would not in my judgment be in any sense thereby concluded. Treaties have effect and bind States only and exclusively. If treaties contain stipulations with regard to rights and duties of the subjects of the contracting States these States must take such steps as are necessary according to their municipal law to make these stipulations binding upon their subjects. Even therefore if I were entirely mistaken as to the effect of the Treaty with reference to the matters in question the appellant would still have to be brought within the terms of the Order upon its true construction with reference to such a matter. It must, however, be agreed that a construction of the Order in his favour is thereby assisted if the view I have taken of the Treaty, and in particular of art. 297, is in substance correct.

With all this in mind I come now to the Order. The property thereby charged is thus described: "All property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force (not being property, rights or interests acquired under any general licence issued by or on behalf of His Majesty), and the net proceeds of their sale, liquidation or other dealings therewith." Now this is, as I have said, the equivalent of a British statutory enactment. In such an enactment, and in such a context, the appellant in my judgment cannot be regarded, on construction, as a German national for the simple reason that he is a British subject. And if art. 297 of the Treaty is to be invoked to assist the construction the appellant cannot be regarded as a German national for the further simple reason that His Majesty's Dominions or Protectorates are not for him "an enemy country." But these considerations, strong in themselves, as I venture to think, for the reasons already given, are, in my judgment, further confirmed in relation to the appellant by a circumstance which appears on the face of the Order itself. The Order excepts from the charge "property, rights or interests acquired under any general licence issued by or on behalf of His Majesty." These words of exception, as

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I think, go far to confirm the view that a British subject's property is not intended to be the subject of charge. For, in this respect, a British subject is less privileged than a German national strictly so called. He does not hold his property under any royal licence: he cannot therefore be made the subject of any licence really appropriate to his case. Can it have been intended that the position of a German national holding property under licence is to be better in respect of it than a British subject who enjoys his property as part of his birthright?

Each and all of these considerations lead me to the conclusion that the appellant—this British subject—is in no way affected by this charge. His property has not been taken from him by the clear and unambiguous statutory words essentially necessary for the purpose: and his case is not covered by the words either of the Treaty or the Order, even if his position was one which had to be judged by the ordinary canons of construction, and with no presumption of any kind in his favour.

It is unnecessary to add that if this conclusion be well founded it is not affected by the power of exemption now reserved to the Board of Trade under the Treaty of Peace Order as amended. If the appellant's property is not charged he is entitled to a declaration to that effect. He cannot be relegated to the mere executive indulgence of a department of State. I would again repeat that I have in no way been dealing in this judgment with the case of a German national whose dual nationality is constituted by his being also the subject or citizen of some other State which is not Great Britain. The basic principle on which this judgment rests would have no application to such an one.

Whether also the decision of P. O. Lawrence J. in *In re Chamberlain's Settlement* (1) may be justified on the special circumstances of that case I say nothing. The grounds on which it actually proceeded are, as I think, for reasons which abundantly appear in this judgment, not

(1) [1921] 2 Ch. 533.

tenable, and this appeal, which in fact although not in form calls for a review of that decision, should in my opinion be allowed.

Appeals dismissed.

Solicitors in *Fasbender* v. *Attorney-General : Cruesemann & Rouse ; The Treasury Solicitor.*

Solicitors in *Kramer* v. *Attorney-General : Rehder & Higgs ; The Treasury Solicitor.*

G. A. S.

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INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

CHANCERY DIVISION.

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1922.—VOL. II. Ch.

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PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C 4.

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